**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**Cr.App. No. 13 of 2005**

**BETWEEN**

**JASON JACKMAN**

**Defendant/Appellant**

**AND**

**THE STATE**

**Plaintiff/Respondent**

**PANEL:**

R. Hamel-Smith, CJ (Ag.)
S. John, JA
P. Weekes, JA

**APPEARANCES:**

Mr. R. Frank appeared on behalf of Appellant No. 2
Ms. S. Chote and Ms. Khan appeared on behalf of Appellant No. 1
Mr. W. Rajbansie appeared on behalf of The State

**DATE OF DELIVERY:**

**JUDGMENT**

Delivered by P. Weekes, JA

J.J. was convicted of two counts of robbery with violence and two counts of robbery with aggravation arising out of an incident in which three men armed with cutlasses and a firearm attacked and robbed patrons in a bar.

No witness placed J.J. on the scene of the robbery. The State's case against him was based on the evidence that some one and one-half hours after the robbery the police had cause to give chase behind a motor vehicle, which was driven by the appellant. As the vehicle stopped three men alighted and ran off and the appellant was apprehended. Two cutlasses were found in the vehicle.

The police gave chase and searched the area and found two other men, one armed with a shotgun.

On being searched the appellant was found to have on his person a bracelet identified as having been stolen at the bar. He allegedly told the police that he had been brought into the robbery by one of his co-defendants for the purpose of driving the getaway vehicle.

At trial the appellant denied committing the offence. He said that he had been plying his motor vehicle for hire when he picked up the three passengers and that the police stopped his vehicle and the passengers ran.

He denied making any oral admissions or having the bracelet in his possession.

Four grounds of appeal were initially submitted on his behalf but at the hearing of the appeal, ground two was abandoned and leave was given to withdraw it.

The first ground was that in directing the jury the trial judge made a fundamental error and did not correct or address it sufficiently when she discovered her error and attempted to rectify it.

In summing up this case the trial judge told the jurors that a verdict of "guilty of recent possession" was open to them as an alternative if they concluded that the appellant was not part of the robberies and therefore found him not guilty of them. This after she had given them extensive directions on the doctrine. It is admitted by the State that such a direction was erroneous in law.

Having had her attention drawn to her error the trial judge recalled the jury and, in an attempt to acknowledge and rectify it, directed them as follows:

> "…you would recall that I gave you a direction as regards Accused No. 1, and I said that you would consider whether or not he was part and parcel of the robbery and if you were to conclude that he was part and parcel of the robbery, then he would be guilty of the robbery. I also said to you that if you were to conclude that he was not part and parcel of the robbery, but that this item of the brass bracelet was found in his possession and you accept that coming from the Prosecution, then you go on to consider whether or not he was guilty of recent possession. I want now to withdraw that direction about recent possession to you. It is not open to you. I am withdrawing it. Do you understand that?
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> So he is either guilty or not guilty of robbery and then you move on to consider the shooting charges in relation to Accused No. 1. But all I told you about recent possession you will be entitled to take that into account, that is, the nature of the item, the time in which it was found, and you will decide whether it was recent in relation to the time when the offence is alleged to have been committed. And if you were to conclude that it was recent, then that goes to support the robbery cases. Are you understanding me? It goes towards supporting the robbery cases, rather than giving him the benefit of an alternative count. Is that clear, Mr. Foreman, Members of the Jury, have you understood that?
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> So there is no alternative of recent possession for you to consider as far as Accused No. 1 is concerned. You will consider all the evidence, you will consider what I have told you about recent possession. *And if you were to conclude that that brass bracelet was found on his person, remember, and I must remind you of his defence, he saying it was never found on him, he was never there. And if you were to conclude he was never there and it wasn't found on him well then, you will take it out of the case and you will consider his confession in*

> *order to decide whether or not he was there* together with all the other circumstances of he being found together with other men, one came out of the car with the gun, and the cutlasses being found, and so on. You would consider everything. But remember he is saying it was not found on his person, he was never there.
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> But if you were to conclude that it was found on his person, look at the timing in relation to the robbery. Look at the nature of the item, and that will go towards proof of the robbery charges. So there is no alternative of recent possession."

Counsel for the Appellant submits that this direction was wholly inadequate for the purpose of clearly indicating to the jury what the error was and directing them correctly on the issue.

In support of her argument Counsel cited the case of ***R V Moon***[1], which is recognised as the standard in outlining what is required of a trial judge when correcting a mistake during a summation.

There are four distinct and separate steps advised in ***R V Moon***

(1) the trial judge must repeat the direction given;
(2) acknowledge that it was wrong;
(3) tell the jury to put out of their minds all that they have heard about it; and
(4) direct them on the correct law in clear terms incapable of being misunderstood.

She submitted that the trial judge's attempt at identifying and correcting her error did not meet the standard in ***R V Moon*** and the appellant was deprived of any chance, which he had of an acquittal.

State Counsel responded that the trial judge had adequately addressed and corrected the initial error. He cited the case of ***Carl Peter Plimmer***[2], which provides that where a

[1] [1969]1 W.L.R. 1705

mistake has been made on a summation the proper course is for the trial judge to recall the jury before its verdict correct the step or mistake and give them an accurate direction and ask them to consider their verdict in the light of that direction. He also argued that the ***R V Moon*** standard had been achieved.

In the instant case the judge told the jurors that she was withdrawing the alternative *verdict* of "guilty of a recent possession" from them. She did not withdraw the issue with her directions thereon. She continued that all her directions on recent possession could be taken into account in support of the robbery charge. She told them it goes towards proof of the robbery charges but the trial judge does not analyse for their benefit just how this could be achieved.

In our view it was imperative in the context of this case for the trial judge to explain how the evidence about the bracelet could support the robbery charge especially since the State's major evidence of the appellant's involvement in the robberies lay in his alleged oral admissions. It was the very same officers who had purportedly witnessed the admission that had found the bracelet. It was incumbent on the trial judge therefore to explain to the jury that they must first find beyond reasonable doubt that the appellant had made the admission and that it was true before they could find any support for the State's case in the recent possession of the bracelet. If they were in doubt or rejected the evidence about the admission, the evidence about the bracelet could not bolster the State's case against the appellant since credibility was indivisible and so they could not have doubt about one aspect of this evidence and be certain about another.

It might have been best for the trial judge to discard the recent possession doctrine altogether and put the evidence in respect of the bracelet in the context of circumstantial evidence.

The jury having been originally told that if they concluded that the appellant was not part of the robbery but was found with the bracelet they could go on to consider recent

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[2] (1975) 61 Cr.App.r. 264

possession (which is in and of itself erroneous in law) must have had some grave difficulty in grappling with a direction that they could not consider guilt based on the doctrine but had to apply it to the issue of support for the charges of robbery.

When the entire issue of recent possession is examined in the context of the evidence and summation we must come to the unhappy conclusion that the jury would have been left in a state of confusion and non-comprehension in respect of the principle of recent possession and its application to the facts of this case.

There is the distinct danger therefore that they could have improperly used their findings of fact in coming to their verdict of guilt. In the circumstances we find that the verdict in the matter was unsafe and the appeal succeeds on this ground.

We must mention that as the State's case against the appellant was that he did not enter the bar but was the getaway driver his convictions for robbery with violence could not stand in any event. There was no evidence that the appellant was party to the use of violence even if he were party to the taking and therefore he could at the highest be convicted of simple robbery. The authority of ***R V Fallon***[3] is instructive on this issue. This point was conceded by the State and is mentioned here for future guidance.

[3] (1963) 47 Cr.App.Reg. 160