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Burdens of Proof and the Doctrine of Recent Possession

J. D. Morton
Osgoode Hall Law School of York University

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J. D. MORTON *

The possession of recently stolen goods will, in the absence of an innocent explanation, support an inference that the possessor knew that they were stolen. The facts on which the inference depends are (1) the possession and (2) the absence of an innocent explanation, and if a person be charged with possession of stolen goods, he is entitled to an acquittal if the court is left with a reasonable doubt as to either or both of these facts. Such is the result if no legal notions such as doctrines or presumptions are involved and such appears to be the position adopted in the decisions in *Rex v. Schama and Abramovitch*,[1] *Regina v. Morin*,[2] *Regina v. Hogg*,[3] and *Regina v. O'Keefe*[4].

Yet all these cases deal extensively with what appears to be an important factor in the result—the so-called doctrine of recent possession. What is this so-called doctrine? Certainly it is not a presumption,[5] nor does it deal with recent possession as it is not the recentness of the possession but the recentness of the theft which is significant. There appears to be little doubt as to the words in which the so-called doctrine may be stated. e.g.

> "If the prosecution establishes the fact of theft and the fact of recent possession by the accused of the stolen goods, then, in the absence of any evidence to explain how the accused obtained possession of them, the jury may convict the accused."[6]

I suggest, however, that there is doubt about the legal function of the doctrine. The conventional view appears to be that it functions by way of the judge's direction to the jury.

> "It is essential in cases of this kind that there be a careful and proper direction."[7]

As to such proper direction there is confusion and this confusion stems from a failure to distinguish between the two notions passing under the name of "burden of proof". I have set out my views on

* Professor Morton, M.A., LL.B. (Trinity College, Dublin), The King's Inns, Dublin, and of Osgoode Hall, Barrister-at-law is a full-time member of the Teaching Staff at Osgoode Hall Law School.

1 (1914), 11 Cr. App. R. 45.
2 [1957] O.R. 337 (C.A.).
3 [1958] O.R. 723 (C.A.).
4 [1958] O.R. 499 (C.A.).
5 *R. v. Morin* at p. 341 *per* Laidlaw J.A.
6 *Ibid.*, at p. 341.
7 *Ibid.*, at p. 341.

this distinction elsewhere[8] and it is sufficient to say here that I accept the term "Primary Burden" as indicating the risk of non-persuasion, and "Secondary Burden" as indicating the risk of non-production of evidence.

The primary burden will assist the trier when, in a criminal case, he has a reasonable doubt as to the facts. In such circumstances, the concept of primary burden directs him to find against him who is under the primary burden, generally the prosecution. It can only function when the trier is in possession of all the evidence; that is, *at the end of the case.* The secondary burden on the other hand is an entirely different and unrelated notion which assists the trier in arriving at a conclusion by an entirely different route. The secondary burden is not concerned with the persuasion of the trier in the particular case, it is concerned with the *preliminary* testing of the evidence and operates by way of the non-suit or directed verdict.

The difference between these two concepts is obvious when one considers the course of a criminal trial before a judge and jury. Not infrequently at the close of the case for the prosecution, defence counsel will move for a directed verdict of acquittal on the ground that there is no case to answer. The trial judge must then rule on whether or not the prosecution has introduced evidence upon which *a reasonable jury* could convict, or, in other words, whether the prosecution has made out a *prima facie* case. It is this burden of producing evidence which could support a verdict, the burden of satisfying the judge in his capacity of preliminary tester, which is distinguished as the secondary burden of proof. Should the trial judge refuse to direct a verdict and permit the case to go to the jury, then the prosecution is properly said to have discharged the secondary burden which was, up till that moment, resting upon it. This secondary burden is properly qualified as a legal notion in that it depends for its operation on the legal device of a directed verdict. Further, in the absence of a true presumption, no secondary burden will be thrust on to the defence. The secondary burden is the risk of a directed verdict; generally there is no directed verdict of guilt in a criminal case. This is not to say that an accused who introduces no evidence does not run any risk. He will of course run the risk of the jury accepting the evidence of the prosecution and convicting. This is not, however, a *legal* risk, i.e. it does not depend on a legal device.

What then of the primary burden in our hypothetical case? This again is a legal notion depending on the legal device of the judge's direction to the jury. Having refused the application for a directed verdict of acquittal, the judge must, in his direction at the end of the case, explain that the risk of non-persuasion rests on the prosecution. He will inform the jury that if they positively accept the evidence offered and the inferences suggested by the prosecution, they must then convict; or if, on the whole evidence, they are left with a reasonable doubt as to the guilt of the accused, they must then

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[8] Special Lectures: Evidence, Law Society of Upper Canada (1955).

acquit. It is the risk of *this particular jury* being left with a reasonable doubt that is properly referred to as the primary burden.

The tendency has been to lump both these notions under the one term "burden of proof". The confusion which inevitably results is well exemplified in the following passage from a recent Ontario judgment.

> "It is possession by an accused person of recently stolen goods that constitutes the foundation of a *prima facie* case against him and creates a presumption of guilt. It is a persuasive presumption which imposes on the accused person a burden of giving an explanation of his possession that might reasonably be true. When such an explanation has been given the burden then continues to rest, as always, on the Crown to prove the guilt of the accused beyond reasonable doubt."[9]

Nothing can "then continue to rest, as always",—the phrase does not make sense, nor does the much quoted direction from *Schama and Abramovitch* make legal sense:

> "Where the prisoner is charged with receiving recently stolen property, when the prosecution has proved the possession by the prisoner, and that the goods had been recently stolen, the jury should be told that they may, not that they must, in the absence of any reasonable explanation, find the prisoner quilty."[10]

The purpose of a judge's direction to a jury is (1) to control the jury, (2) to assist the jury. In what way does the above direction fulfill these functions? The jury are told that they *may* convict. Now "may" imports "may not" so the direction can be paraphrased in part to read,

> "The jury must be told that they may or may not . . . in the absence of any reasonable explanation find the prisoner guilty."

I hope that the absurdity of such direction is obvious. It neither controls nor assists the jury in any way and if it conveys to the jury anything at all, it is that they are free to act capriciously in the matter. Further, as pointed out in argument in *Morin,* if the trial judge uses the word "presumption" in such context, the jury in an attempt to take some meaning from the direction, are likely to take it at the least as meaning that they are expected to convict.

Before attempting a solution to the mystery of the proper function of the so-called doctrine, it is proposed to examine two recent Ontario cases.

Regina v. O'Keefe

This was an appeal from a conviction on a charge of breaking and entering. Stolen goods, the subject matter of the charge, were proved to bear the finger prints of the accused. The trial judge based the conviction on a finding that;

(i) the fingerprints established that the accused had had possession of the goods, and

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[9] *R. v. O'Keefe, ante footnote* [4] at p. 502, *per* Laidlaw, J.A.
[10] *Ante* footnote [1] at p. 49, *per* Reading, L.C.J.

(ii) the explanation offered by the accused was not one that he could accept as one that might reasonably be true.

The Court of Appeal allowed the appeal, quashed the conviction and ordered a judgment of acquittal entered. It is proposed to examine each of the judgments.

Laidlaw J.A.

Laidlaw J.A. apparently based his decision on a finding that the Crown had "failed to establish a *prima facie* case against the accused because there was no sufficient proof that any of the stolen articles were in the possession of the accused at any time."[11] The decision to quash the conviction did not then depend on the so-called doctrine of recent possession, since in this instance there was no basis established on which to found the so-called doctrine. Admittedly, there is some ambiguity as to the meaning intended to be conveyed by the term *"prima facie"* by reason of the reference to "conclusive proof" in the preceding paragraph.

> "The mere fact that a person has handled stolen goods and left his finger prints on them is not conclusive proof that he had possession in law of them."[12]

Now, in order to get its case to the jury, the prosecution is not required to produce any more than evidence on which a reasonable jury, properly directed, *could* find possession. It is not required to demonstrate possession. True, the finger prints are not conclusive but it is submitted that this is immaterial.
The paragraph continues:

> "That fact alone does not raise any presumption that they came into his possession in a dishonest or unlawful manner."[13]

If the fingerprints would not support a finding of possession in law, then it is hard to see how they could establish something which depends upon a finding of possession in law.
The paragraph continues:

> "The inference cannot be drawn from that fact alone, that he had any control whatsoever in respect of the stolen goods: Indeed, the mere fact of handling stolen goods and leaving fingerprints upon them is equally consistent with innocence as with any wrongful act in respect of them."[14]

The first sentence of this concluding portion clearly refers to possession in law. The final sentence however refers to "a wrongful act in respect of them". It must be pointed out that "possession in law of stolen goods" is not of itself wrongful in the absence of guilty knowledge on the part of the possessor.

Taken as a whole, however, the paragraph does support the suggestion that Laidlaw J.A. allowed the appeal on the basis that there was no evidence on which a reasonable jury could have found

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[11] *R. v. O'Keefe*, [1958] O.R. 499, at p. 505 (C.A.).
[12] *Ibid.*, at p. 505.
[13] *Ibid.*, at p. 505.
[14] *Ibid.*, at p. 505.

possession. This suggestion is further supported by the references to *prima facie* proof of possession in the judgments of Lebel and Morden JJ.A. in the same case. By this view, the remarks of Laidlaw J.A. on the so-called doctrine of recent possession must be read as *obiter dicta.*

In any event, the learned judge defined the so-called doctrine of recent possession (in the passage quoted above[15]) and considered the finding of the trial judge that the explanation advanced by the accused was not one he could accept as "one which might reasonably be true".

> "In a case in which the doctrine of recent possession is properly applicable, the accused may be found guilty in the absence of an explanation of his possession of stolen goods that *may* reasonably be true. In my opinion, the accused gave an explanation of that kind and character, and the burden then continued to rest on the Crown to prove beyond reasonable doubt that the accused was guilty of the offence with which he was charged."[16]

The explanation actually advanced by the accused was that he had happened to meet a man named George who told him that he was "in the selling field"; that George asked if he could sell the accused anything and that out of curiosity, he had examined some of the goods, leaving his finger prints upon them. It must be pointed out that this is not an explanation of his possession of the goods. It is a denial of possession in law. His Lordship concluded:

> "The explanation given by the accused in this case creates in my mind a reasonable doubt as to his guilt, and the Crown offered no evidence in reply to remove that doubt. Therefore, in my opinion, the case for the prosecution fails for want of proof."[17]

In view of the well settled rule that in general a court of appeal will not substitute its finding of fact for that of the trial judge, it must be taken that the decision was that no reasonable jury could have been left without a reasonable doubt as to guilt, i.e. the verdict could not be supported by the evidence.

LeBel J.A.

LeBel J.A., while he did not agree with Laidlaw J.A. that proof of the fingerprints would not constitute a *prima facie* case, apparently allowed the appeal on the ground that the verdict could not be supported by the evidence.

> "The explanation might reasonably be true on the state of the record in my opinion, and he was entitled, therefore, to the benefit of the doubt. I agree with Morden J.A., as to the cogency, from the Crown's standpoint, of the evidence of the fingerprints. They were found upon recently stolen goods to which the appellant had had no lawful right of access, and I should be reluctant, indeed, to hold that the law is such that no explanation was required of him in the circumstances. I think there was. He had *prima facie* possession, at least. . . . The appellant was called upon at the end of the Crown's case to show, if he could, that his account of an innocent handling of the goods was one that might reasonably be true. This is what . . . the appellant showed here."[18]

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[15] *Ibid.*, at p. 505.
[16] *Ibid.*, at p. 505.
[17] *Ibid.*, at p. 506.
[18] *Ibid.*, at p. 507.

Only two things suggest that the learned judge was influenced by the so-called doctrine of recent possession. Firstly, the proposition that with the establishment of a *prima facie* case a burden of some sort is imposed on the accused, and secondly, the references to "an explanation which might reasonably be true". It should be noted that in *Rex v. Woolmington*[19] the House of Lords held that the establishment of a *prima facie* case by the prosecution did *not,* of itself, impose *any burden* on the defence.

Morden J.A.

Morden J.A. differed with Laidlaw J.A. as to the legal significance of the fingerprint evidence.

> "In my opinion, the Crown had made out a *prima facie* case of possession in law against the appellant. If this trial had been before a jury, the Judge could not have directed them to bring in a verdict of acquittal."[20]
> ". . . At this stage of the case, no question of proof beyond a reasonable doubt arises. From the proof of the appellant's fingerprints upon the stolen articles, an inference could have been drawn that he had possession in law. Whether or not such an inference should be drawn in any particular case is a question for the jury, and in this case for the trial Judge only, after all the evidence had been adduced. . . .
> . . . In my opinion, in the instant case the trial Judge correctly rejected the motion of the appellant's counsel to dismiss the charge at the conclusion of the Crown's case.
> The secondary onus, that of adducing evidence, passed to the appellant. If he had called no evidence explaining the presence of his fingerprints, then he would have run the risk of the Judge drawing the inference that he had had possession in law and finding him guilty. However, he did give evidence on his own behalf and I agree with the careful analysis of this evidence by Laidlaw J.A. and his opinion of its affect. The appellant's explanation of the presence of his finger prints, in all the circumstances of this case, might reasonably be true. The Crown had thus failed to discharge the primary onus, which continued throughout the trial, of proving that the appellant had had possession in law of the goods. The essential foundation for the doctrine of recent possession was not established and the appellant was, therefore, entitled to have been acquitted. . . ."[21]

It would appear from this that Morden J.A. acknowledges the existence of three different kinds of burdens of proof. He agrees with the proposition, set out earlier in this article, that one may be described as "Primary", continuing throughout the trial and concerned with persuading the trier after all the evidence has been adduced. He agrees further that there is a different onus on the prosecution of establishing a *prima facie* case, with the penalty of a directed verdict of acquittal in the event of failure. This is referred to by His Lordship, by implication, as the secondary burden in the above quoted sentence, "The secondary onus, that of adducing evidence, *passed* to the appellant". However, this burden, which "passed" to the appellant, was not the same burden as had rested on the prosecution up till the moment the trial judge rejected the motion for a directed verdict. The secondary burden on the prosecution was a burden with *legal* effect—it was the risk of a directed

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19 [1935] A.C. 462
20 *R. v. O'Keefe, ante* at p. 509.
21 *Ibid.,* at pp. 509, 510.

verdict; the so-called secondary onus on the appellant had no *legal* effect—if he had not adduced evidence there would have been no legal consequence, no directed verdict of conviction. His was not the legal risk, but the factual risk of the trier saying "Well, he has not given an explanation, and unexplained possession convinces me of his guilt". Suppose he advanced an explanation that in the mind of a trial judge sitting with a jury, might reasonably be true, would the trial judge thereupon direct the jury to acquit? Surely not![22] In the words of Morden J.A. himself, "whether or not an inference should be drawn in any particular case is a question for the jury".[23] It is this factual risk of losing the case which has caused great confusion in the classification of burdens of proof. It has been variously referred to as the "provisional" burden, the "tactical" burden, both of which are devoid of legal effect. It is presumably what Laidlaw J.A. referred to as "a persuasive presumption".[24] That such persuasive presumption is devoid of legal effect is obvious from the already quoted words of Laidlaw J.A.

> ". . . imposes . . . a burden of giving an explanation . . . that might reasonably be true. When such an explanation has been given the burden then continues to rest, as always, on the Crown to prove the guilt of the accused beyond reasonable bounds."[25]

In other words, whether or not the accused gives an explanation that might reasonably be true, the burden of proving the guilt of the accused beyond a reasonable doubt rests upon the Crown. If the so-called burden resting on an accused has no legal effect, why mention it? Why give it a legal name? It is hoped to attempt to answer this question after an examination of another recent Ontario case.

Regina v. Hogg

This was an appeal from a conviction on two counts, the first of breaking and entering and theft, the second of receiving goods knowing them to have been stolen. The defence was an *alibi* for the time when the goods were proved to have been stolen and an explanation that the accused was merely keeping the goods for another person and "did not know the stuff was stolen". There was no direct evidence as to the breaking and entering and theft charge. One of the grounds of appeal was that the trial Judge had failed to properly direct the jury on the doctrine of recent possession.

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[22] Glanville Williams in his Criminal Law, The General Part (1953), at p. 698, advances the converse proposition that the trial judge may test the defendant's evidence in rebuttal in order to see whether it is fit to be left to the jury. In this view, the trial judge, at the end of the course, would consider the reasonableness of an explanation advanced by accused before permitting that explanation to go to the jury. It would appear that there is no authority for such proposition if one appreciates that the remarks, e.g. in *Richler v. The King*, [1939] S.C.R. 101, as to the trial judge applying his mind to the reasonableness of the explanation, refer to a trial judge sitting alone. He is then to apply his mind to such a question just as the jury must do. *Mancini v. D.P.P.*, [1942] A.C. 1, is authority for an unrelated proposition that a trial judge need not put evidence to a jury, which even if believed by the jury would not amount to a defence in law.

[23] *R. v. O'Keefe, ante* at p. 509.

[24] *Ibid.*, at p. 502.

[25] *Ibid.*, at p. 502.

Schroeder J.A.

In allowing the appeal and directing a new trial, Schroeder, J.A. said,

> ". . . A careful perusal of the charge does not disclose that any instruction was given to the jury in accordance with the rule stated in *Richler v. The King*, [1939] S.C.R. 101. . . . The learned trial Judge instructed the jury that in considering the *alibi* defence presented by the two accused, they should determine whether it "might reasonably be true" but no similar instruction was given to the jury with respect to the appellant's explanation of his possession of the stolen property. . . ."
> ". . . In my respectful opinion the objection taken to the learned trial Judge's charge is fatal, and the non-direction complained of amounts to misdirection. *Recent possession of goods proved to have been stolen is at most prima facie evidence that they have been illegally obtained*, and is circumstantial evidence from which an adverse inference may be drawn in the absence of an explanation which might reasonably be true. *Recent possession standing by itself could not support a finding of guilt*, because it is not inconsistent with innocence. It is the absence of an explanation which might reasonably be true that gives probative force to the circumstances of such recent possession: *R. v. Scarle* (1929), 51 C.C.C. 128. In defining the doctrine of recent possession the learned trial Judge did not direct the jury's attention to the importance to be attached to the prisoner's explanation of his possession of the goods when applying that doctrine. . . ."[26]

Schroeder J.A. then referred to the "true rule" as found in *Richler*,[27] *Schama*,[28] and *Ungaro*.[29]

Porter C.J.O. (MacKay J.A. concurring)

Porter C.J.O. concurred with the result arrived at by Schroeder J.A. but disagreed in part with his statement of the law as to recent possession and its force and effect as *prima facie* evidence.

> ". . . Recent possession of goods proved to have been stolen is *prima facie* evidence that they have been illegally obtained. Recent possession standing by itself could support a finding of guilt. . . ."[30]

If this passage and the statements of Schroeder J.A. (set in italics in the judgment quoted above) be compared, there appears to be a disagreement as to the meaning of *"prima facie."* When Schroeder J.A. says "Recent possession is at most *prima facie* evidence" and then "Recent possession standing by itself could not support a finding of guilt", he might be understood as drawing a distinction between *"prima facie* evidence" and "evidence which could support a finding of guilt". This, indeed, would appear to be the meaning that Porter C.J.O. took from his words. However, when one tries to attach meaning to the words "standing by itself", it becomes apparent that the disagreement is merely verbal. Recent possession cannot "stand by itself" *at the end of the case* (a finding of guilt can only be made at the end of a case). If there is no explanation of the possession, then it stands with the fact of no explanation (an explanation which might not reasonably be true is, in legal effect, no explanation). As

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26 *R. v. Hogg*, [1958] O.R. 723 at pp. 727, 728 (italics added).
27 [1939] S.C.R. 101.
28 (1914), 11 Cr. App. R. 45.
29 [1950] S.C.R. 430.
30 *R. v. Hogg* at 729.

suggested at the beginning of this article, the absence of an explanation is just as much a fact as the presence of an explanation.

Is not the Crown under the secondary burden of introducing evidence as to this fact of no explanation in order to avoid a directed verdict of acquittal? It is submitted that the Crown is under no such burden and that it is the so-called doctrine of recent possession which frees the Crown from this risk of a directed verdict. It is further submitted that the doctrine of recent possession does no more than discharge this burden.

To re-state the author's proposition: a jury could logically infer the fact of stealing or guilty knowledge on the basis of (1) possession in law, (2) no (reasonable) explanation of such possession. Generally the prosecution must introduce evidence upon the basis of which an inference of guilt *could* be drawn by a reasonable jury. If the general rule is applied, the Crown would therefore be required to establish the two basic facts of (1) possession in law and (2) no (reasonable) explanation, or suffer a directed verdict. In these cases of theft and receiving where the doctrine applies, the Crown is, however, freed from the risk of a verdict being directed on the ground that they have introduced no evidence which could support a finding of no (reasonable) explanation. They must be allowed to go to the jury on evidence which could establish possession in law.

If this proposition be accepted, then the apparent conflict between the views of Schroeder J.A. and Porter C.J.O. disappears and they may both be taken as supporting the following proposition:

(i) Possession of goods proved to have been recently stolen is *prima facie* evidence that they have been illegally obtained, i.e. the Crown will escape a directed verdict by introducing evidence on which a reasonable jury could find possession in law.

(ii) A reasonable jury could infer guilt upon the basis of possession in law and the absence of an explanation which might reasonably be true.

Conclusion

It is this writer's contention that the doctrine of recent possession has no other function than to discharge the secondary burden which would otherwise rest on the prosecution. In this view, therefore, the doctrine of recent possession is a matter for the judge and *should never be mentioned to the jury.*

What then of the direction apparently required by the *Schama* judgment? If one examines the charge of the learned trial Judge in that case, it is apparent that he had, in effect, directed the jury that unless they found an explanation to satisfy themselves, they *must* find the accused guilty. It is submitted that the oft-quoted words of the Court of Criminal Appeal amount to no more than "the learned trial Judge should not have told them that they must convict".

In any case of theft or receiving in which the prosecution establishes possession of the goods there are two possibilities:

(i) the accused may offer *no* explanation of such possession, or

(ii) the accused may offer an explanation.

Admittedly, according to *Schama,* where there is no explanation the jury should be directed that they may find the accused guilty. It has earlier been submitted that such direction is meaningless. What would amount to a helpful direction in such a case? It is submitted that, where the prosecution has introduced *prima facie* evidence of possession in law and the accused has offered no explanation at all, the trial Judge might usefully direct the jury in the following way.

> If you are not satisfied beyond a reasonable doubt that the accused had possession in law of the goods, you must acquit. If you are satisfied beyond a reasonable doubt as to his possession in law of these goods then you will take into account the absence of any explanation of such possession. If, however, you are left with a reasonable doubt on the whole evidence as to the guilt or innocence of the accused, then you must acquit.

The objection may be made that such a direction, in the absence of any explanation, might amount to misdirection in that it would be "comment on the failure of the person charged to testify", contrary to the Canada Evidence Act s. 5(5). *Burdell*[31] is, however, authority that such a comment is not prohibited.

What direction is suggested in a case where the accused, either himself or through other witnesses, has put forward an explanation of his possession? Here the writer can call on distinguished authority for the following:

> "It is not necessary to use on all occasions the formula which was used in Rex v. Schama and Abramovitch . . . if the explanation given by the accused persons which, when they have given it becomes part of the sum of evidence in the case, leaves the jury in doubt whether the accused honestly or dishonestly received the goods, they are entitled to be acquitted because the case has not been proved."[32]

In other words the jury should be told that if they are left with a reasonable doubt on the whole evidence, they must acquit.

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31 (1906), 11 O.L.R. 440, at p. 448, *per* Osler J.A.

32 *R. v. Hepworth and Fearnley,* [1955] 2 Q.B. 600, at pp. 602, 603, *per* Goddard, L.C.J.