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SUPREME COURT OF VICTORIA

DPP v MIERS

Smith J

12, 15, 26 September 1997 — (1997) 96 A Crim R 408

CRIMINAL LAW – UNLAWFUL POSSESSION – DEFENDANT INTERCEPTED DRIVING MOTOR VEHICLE WITH TWO PASSENGERS – DEFENDANT ARRESTED – CASH LATER FOUND IN BOOT OF VEHICLE SUSPECTED OF BEING STOLEN OR UNLAWFULLY OBTAINED – WHETHER DEFENDANT IN ACTUAL POSSESSION OF CASH WHEN SUSPICION FORMED – WHETHER HAVING REGARD TO THE PASSENGERS DEFENDANT HAD EXCLUSIVE POSSESSION OF THE CASH: *SUMMARY OFFENCES ACT* 1966, S26.

M. was intercepted driving a motor vehicle. There were 2 other passengers in the vehicle. M. was arrested for a drug offence and taken to the rear of the vehicle and upon request, opened the boot with the keys he had taken from the ignition. A short time later a police officer located a bag in the boot which contained a large quantity of cash which was suspected of being stolen or unlawfully obtained. A charge of unlawful possession was laid and at the hearing, the magistrate upheld a 'no case' submission and dismissed the charge on the ground that having regard to M.'s being in the custody of and under the police officer's control the magistrate was not satisfied that M. had actual possession of the cash at the time the suspicion was formed. Upon appeal—

HELD: Appeal dismissed.
1. The question whether goods are in the "actual possession" of a defendant is one to be determined in light of all the circumstances. Should that person be under arrest, that will be a significant fact and may be determinative of the outcome in most cases. A person under arrest is under compulsion and is no longer a free person; however, the circumstances of each case need to be considered.

2. In the present case, there were two bases upon which the magistrate's decision may be justified:
(a) M. no longer had the complete present, personal, physical control of the property to the exclusion of others at the time the relevant suspicion was formed. M. did not have the present manual custody, nor did he have an exclusive right or power to place his hands on it and thus achieve manual custody when he wished. He was under arrest and not a free agent at the material time. He was disconnected from the cash and no longer had complete exclusive physical control of it.

(b) Whilst M. indicated ownership of the bag and a knowledge and involvement in placing the cash in the bag, there were three persons who could have had a right to possession of the cash. There was no evidence which was capable of demonstrating directly, or giving rise to inference, that M. was in possession of the cash to the exclusion of the others or that the occupants of the vehicle were acting in concert in relation to the cash.

SMITH J: [*After setting out some of the affidavit material, the questions of law to be decided and the provisions of s26 of the* Summary Offences Act *1966, his Honour continued*] … **[5]**
Question 1: Whether the learned magistrate erred in holding that the respondent did not have "actual possession" of the property in question.

The appellant first submits that the learned magistrate determined the no case submission on the basis that once a citizen is under arrest, that fact alone makes a citizen incapable of having "actual possession" of a chattel and that that view was wrong in law. In my view, the argument ignores the reality of what occurred below. The reasons given were very brief. The learned magistrate, in referring to the arrest, was doing so in the context of the circumstances surrounding the arrest revealed in the police evidence before him. He did not ignore them. He simply did not enumerate them in his brief reasons. If the learned magistrate had ignored those circumstances he would, in my view, have been in error. This conclusion flows from the authorities on the meaning of "actual possession". It is convenient to refer first to the decision of *Kitchen v Cox* (1996) 85 A Crim R 328, the case cited to the learned magistrate. In that case police observed a Toyota station wagon towing a trailer which answered the description of a vehicle given by a bottle shop manager who had been the victim of the theft of a bottle of Glenfiddich whisky. That description included the registration number. The informant stopped the police vehicle in front of the vehicle in question. He spoke with the driver, Cox, and subsequently the passenger, Williams. Cox gave his name and address and admitted that he owned the Toyota wagon. He had nothing

to say to the allegations that he had stolen the whisky. Kitchen then arrested Cox, giving him the appropriate warnings. He asked whether Cox had any objection to him searching the vehicle. Cox replied in the negative. Kitchen then handcuffed Cox and placed him in the rear of the police vehicle. After a conversation with Williams, Kitchen arrested him. He had no other handcuffs, however, and he told Williams to sit down next to the vehicle. He then conducted a search of the vehicle, finding a bottle of Glenfiddich whisky between the passenger's and driver's seats. He next **[6]** located a quantity of workshop-type equipment, including welding and cutting and drilling equipment, all of which was brand new, and a substantial amount of other property in the back of the vehicle. He immediately suspected that this was stolen. Both men were charged with theft of the scotch whisky. Cox pleaded guilty and was fined on that charge. He was also charged with an offence under s26 of the *Summary Offences Act* 1966 in respect of the other chattels. As in the present case, a submission was made that there was no case to answer. The arguments apparently focused on the question of whether the goods were in the actual possession of Cox at the time the relevant suspicion was formed. The magistrate upheld the submission of no case to answer. Hedigan J ruled that the learned magistrate had said:

> "... the question whether the defendants could be said to have had exclusive, actual and immediate physical possession at the time of the formation of the suspicion by the informant was the critical question. The magistrate concluded that it could not be said that the defendants were in a position where they did have physical and actual personal control of the goods, stating that the position may have been different had they not been arrested." (At 332)

In his reasons, Hedigan J quoted the passage from the judgment of Isaacs J in *Moors v Burke* [1919] HCA 32; (1919) 26 CLR 265; 25 ALR 213, which appears to have been accepted for many years as the definitive statement of what constitutes "actual possession". *[After quoting the statement his Honour continued]* ...**[7]** His Honour commented that the issue before him concerned the question whether:

> "possession could exist in Cox or Williams, notwithstanding their detachment, so to speak, under arrest from the vehicle in which the goods were when the suspicion was formed." (333)

He acknowledged that if Cox had been standing unarrested outside the vehicle cleaning its windscreen when Kitchen formed the suspicion concerning the property in the car it could hardly be said that he was not "in possession" of the car and, therefore, of the goods inside it in which the goods were at the relevant time simply because he was standing outside it. He commented that the "key circumstance" appeared to him to be the, "additional and different one, namely that at the time the suspicion was formed Cox had been arrested, handcuffed and placed in the police vehicle." He went on to say: (at 333)

> "In those circumstances, it seems to me there is no basis on which it could be thought that if he had possessed the goods, he was capable of exercising the power to resume control of the possession of the goods, either exclusively or non exclusively, at his election, will or favour. On the contrary, it was strongly argued he had been dispossessed of them by the arrest, and also by him being placed in handcuffed custody.

It could not in those circumstances be said that he had either legal or actual physical possession of the goods in his vehicle. This seems to me the basis upon which the magistrate distinguished those authorities cited to him in relation to possession, notwithstanding it was not then direct and actual physical possession...." It seems to me that Hedigan J in his reasons was saying that there had been a detachment from actual possession brought about by the arrest in the circumstances of the case. Those circumstances included the fact that Cox had been handcuffed and placed in the police vehicle. I do not consider that Hedigan J was **[8]** saying that arrest in all circumstances will create a detachment such as to terminate actual possession.

There is also authority dealing with situations where a person under arrest has been held to be in "actual possession" in the relevant sense. I refer firstly to *Hofstetter v Thomas* [1968] VicRp 20; [1968] VR 199. In that case Mr Hofstetter had been arrested by police while walking in a street in Melbourne carrying a briefcase containing £4200. At Russell Street he was interviewed and asked to empty all his pockets. He did so for all but a small pocket. This was then found to contain keys to a safe deposit box. He was asked if he would be willing to take one Gardner, the interviewing police officer, to the safe deposit box to show him what it contained. He agreed to do so. Gardner then returned the keys to him for this purpose and he, Hofstetter, and two Tax

Department investigators, who had joined them, left Russell Street and went to the location of the safe deposit box. On arrival the manager escorted the appellant and the two investigators to the safe deposit box while Gardner completed identification procedures. In the absence of Gardner, Hofstetter handed his key to the manager who opened the box and handed Hofstetter the metal box contained in it. Hofstetter then carried the box to an inspection room where he and the investigators were left by the manager. Gardner joined them there. Hofstetter then opened the box. It was seen to contain a large number of bank notes. Gardner then asked Hofstetter questions about the money.

In his reasons, Menhennitt J noted that from the time the appellant was asked if he would take Gardner to the safe deposit box to show him its contents until Gardner took possession of the money after the interview at the safe deposit box premises, the appellant was in custody and believed that that was the situation. Menhennitt J noted that the appellant had formed the view that in due course the police or taxation authorities would, in view of his arrest and the surrounding circumstances, gain access to the safe deposit box. He decided accordingly, without any pressure, other than those beliefs, to open the box for inspection. His Honour noted (at 203) that when the safe deposit box was handed to Hofstetter by the **[9]** manager and was opened the present manual custody of the money in it was then with Hofstetter. He noted, however, that mere custody was not enough, but "actual possession" required, "the complete present personal physical control of the property to the exclusion of others not acting in concert with him."

His Honour also noted (at 204) that for the police to gain access to the box they had to be authorised by Hofstetter and that this, no doubt, explained why Gardner asked Hofstetter if he was willing to take them to the safe deposit box and show them what it contained and why the keys were returned to Hofstetter for that purpose. As a result His Honour noted:

> "when the appellant handled the box, the police had neither the possession nor the right to possession of the £13,400".

Counsel for the respondent Miers submitted that this is to be contrasted with the present case where the police had the power to search the vehicle and containers in it pursuant to s82 of the *Drugs, Poisons and Controlled Substances Act* 1981. His Honour's view was that once Hofstetter, having the right to possession of the contents of the box and the means of access, went to the box and took physical custody of the money in it he was then in "actual possession" of it (at 205). It seems to me that, in its unusual circumstances, *Hofstetter v Thomas* is an example of a case where a person under arrest, may nonetheless, have the actual possession of goods, the subject of the investigation by the police. Clearly from his Honour's reasons much will depend upon the facts. This case also cannot be used as an authority for the proposition that arrest is irrelevant to the question of whether a person has actual possession of the chattels in question.

Counsel for the respondent submitted that the decision in *Hofstetter* should be revisited because of the developments that have occurred since 1968 in the law about what may and may not be done to persons who are arrested. It is not **[10]** necessary, however, to explore the significance of these developments in the context of this case. Reference should also be made to statements in *Rowe v Galvin* and *McKeown v Hill* [1984] VicRp 26 [1984] VR 350 (*Rowe v Galvin*) which tend to support the proposition that a person under arrest may nonetheless retain actual possession of goods notwithstanding that they are thereby detached from those goods. *Rowe v Galvin* is a decision of the Full Court. The appellant particularly relies upon a statement by Starke J to the effect:

> "No doubt if the money remained on the seat he would still have been in possession of it, it being his motor car." (p356))

The facts of *Rowe v Galvin* were described by Hedigan J in *Kitchen v Cox* in the following relevant manner (at 333):

> "Hill was the driver of the vehicle in which Galvin was a passenger. Relevantly, they were both charged under s26 in relation to various goods. A sum of money wrapped in paper had been in the vehicle. Hill, the driver, had sat on it. He was the owner of the vehicle. Hill had been taken to the police station and Galvin took the parcel of money with her, that is, she had removed it from the vehicle. She had voluntarily given it to a police officer."

Charges were laid against both Galvin and Hill. The magistrate dismissed the charges. The Full Court upheld the informant's appeal in the Galvin matter. In relation to the charge against Hill, the money was not in the vehicle at the time the police officer formed the suspicion because it had passed into the custody of Galvin who had given it to the police. In *Kitchen v Cox* Hedigan J declined to consider whether the observation of Starke J made in relation to the facts in *Rowe v Galvin* was correct. His Honour noted: (at 333) "that might depend on the facts, not all of which were investigated." He went on to consider the example, mentioned above, of Cox standing unarrested outside the vehicle cleaning it when the suspicion was formed about the property inside it.

[11] It is, I think, sufficient to observe that Starke J's comments were *obiter dicta*, and that Starke J used the word "possession", not "actual possession". His Honour also postulated a situation in which the car was owned by the accused and the police had shown no interest in the motor vehicle except to stop it and cause the defendant to alight from it. In those circumstances, depending on all the relevant facts, it may well be that if the person is arrested and taken from the scene where the car is left that the chattels in the vehicle remain in the possession of the arrested person. It might also, however, be relevant to know whether the car was locked and who had the key.

It was also common ground that where a person is arrested and the relevant suspicion is formed in respect of goods on the person of the individual arrested, the arrested person would be held to have had, at the time the suspicion is formed, the "complete present personal physical control of the property to the exclusion of others not acting in concert with the accused."

It seems to me that the question whether the goods are in the "actual possession" of a defendant is one to be determined in light of all the circumstances. Should that person be under arrest, that will be a significant fact and may be determinative of the outcome in most cases. A person under arrest is under compulsion. That person is no longer a free person. (*R v Inwood* [1973] 2 All ER 645; (1973) 1 WLR 647; (1973) 57 Cr App R 529; *Alderson v Booth* [1967] 2 QB 216; (1969) 2 All ER 271; 53 Cr App R 301; *R v O'Donoghue* (1988) 34 A Crim R 397). The circumstances of each case, however, need to be considered.

It is necessary, therefore, to consider the appellant's alternative argument that the learned magistrate's conclusion that the informant had not made out a prima facie case of "actual possession" was a conclusion that was not open on the evidence. To reach a decision on this argument it is necessary to determine what evidence was before the learned magistrate and whether it could, if accepted, support a finding of "actual possession". (*Doney v R* [1990] HCA 51; (1990) 171 CLR 207; 96 ALR 539; (1990) 65 ALJR 45; 50 A Crim R 157; [1990] LRC (Crim) 416). *After referring to the arguments advanced by the appellant and respondent, his Honour continued*] ...

[16] It seems to me that in those circumstances the assumed facts relied upon by the appellant set out in the order should be restated as follows:

> Whether the learned magistrate erred in law in holding that the respondent was not, within the meaning of s26 of the *Summary Offences Act* 1966, in 'actual possession' of the property the subject of the charge having regard to the evidence before him that the property had been found within a vehicle the respondent had been driving:
> (i) after the respondent had alighted from that vehicle;
> (ii) after the respondent was considered by a police member to be in 'custody' for the purposes of s464(1) of the *Crimes Act* 1958;
> (iii) after the respondent had been arrested by a police member for a drug offence;]
> (iv) after the respondent had been requested by a police member to open the boot of the vehicle;
> (v) after the respondent, at the request of a police member, removed the keys from the vehicle's ignition and moved to the rear of the vehicle and unlocked the boot;
> (vi) while the respondent stood nearby in the company of the arresting officer as a police member searched the boot and located a black bag which contained the said property in relation to which the police member formed a reasonable suspicion that it was stolen or unlawfully obtained.

To the foregoing should be added the undisputed facts that there were three people travelling together in the car when it was stopped and searched, that the car was a hire car with Queensland registration and Mr Miers lived in Rosedale, Victoria. No evidence was led to link the car with Mr Miers as its owner or hirer. The question to be determined is whether the appellant has demonstrated that the learned magistrate erred in light of this analysis in finding that the

Crown had failed to make out a *prima facie* case of "actual possession". In my view he was correct in so finding.

Looking at the informant's case at its highest, there are two bases upon which the decision may be justified. The first is that the respondent no longer had the complete present, personal, physical control of the property to the exclusion of others at the time the relevant suspicion was formed. He did not have the present manual custody, nor did he have an exclusive right or power to place his hands on it and thus achieve manual custody when he wished. He was under arrest. While he had been cautioned and in the course of it told that he did not have to do anything, he was directed by the police to remove the keys from the ignition and open the boot. While he had a choice not to respond to the directions of the police, he was under arrest and in the custody of Constable Phelan and under police control at all **[17]** material times.

Unlike Mr Hofstetter, he was not a free agent at the material time. He was disconnected from the money. He no longer had complete exclusive physical control of the money. In addition, it is clear on the evidence before the learned magistrate that the informant had not adduced evidence which would address the difficulty that there were three persons who could have had a right to possession of the money. On the basis of his admissions, the defendant had indicated a knowledge and involvement in the placing of the money in the bag and admitted that the bag in which it was found was his. He, however, denied that the money was his and said it belonged to a number of persons. The Crown failed to lead evidence which was capable of demonstrating directly, or giving rise to the inference, that he was in possession to the exclusion of the others or that the three were acting in concert in relation to the money. The evidence was insufficient to raise a *prima facie* case to that effect, either directly or indirectly.

The foregoing analysis may suggest a strict approach to the provision. It must be remembered, however, that the provision involves "some drastic interference with the rights of citizens." (*Kitchen v Cox* at 330). As Hedigan J noted in that case:

> "The section is founded upon a suspicion formed in relation to goods in the actual possession of an individual who is, if the criteria are established, then obliged to give an explanation to a court in order to exculpate that person from the offence. It effectively reverses the burden of proof."

It should also be borne in mind that the typical case to which the section is addressed is that of the person not under arrest. On formation of the requisite suspicion, that person can then be arrested.

Question 2 – The application and interpretation of *Kitchen v Cox*.

As stated above, the appellant submits that the learned magistrate took the view that a person under arrest cannot have "actual possession" within the **[18]** meaning of the Act. He submits that in so doing the learned magistrate relied upon the case of *Kitchen v Cox* (1996) 85 A Crim R 328 and interpreted that decision wrongly. The appellant submits that each case must in fact be determined in light of all the circumstances.

In my view the learned magistrate's reasons, such as are revealed in the affidavit material, should be construed as applying the reasoning in *Kitchen v Cox*, and not applying it as an authority for the proposition that arrest of a person must terminate actual possession in all cases. What His Worship was saying was that, on the authority of *Kitchen v Cox*, Mr Miers could not be said to be in actual possession of the goods in question at the time the suspicion was formed because of the arrest and the circumstances attaching to it. I refer to my analysis of *Kitchen v Cox* above. I am not persuaded that the learned magistrate failed to apply *Kitchen v Cox* correctly. The appeal should be dismissed.

APPEARANCES: For the DPP: Mr C Ryan and Mr M Regan, counsel. P Wood, solicitor. For the Respondent Miers: Mr B Woinarski QC, counsel. Cynthia A Toose, solicitor.
