11/03; [2003] VSC 104

SUPREME COURT OF VICTORIA

GOLDBERG v BROWN

Osborn J

28 March 2003 — (2003) 38 MVR 389

SEIZURE OF MOTOR VEHICLE – VEHICLE SAID TO BE A RE-IDENTIFIED VEHICLE – ORDER MADE BY MAGISTRATE FOR VEHICLE TO BE RETAINED BY POLICE AND FOR FORENSIC ANALYSIS – APPLICATION BY VEHICLE OWNER FOR RETURN OF VEHICLE – MATTERS TO BE CONSIDERED ON SUCH APPLICATION – WHETHER POLICE HAD REASONABLE GROUNDS IN MAKING INITIAL SEIZURE – WHETHER DIRECTION GIVEN BY MAGISTRATE VALID – WHETHER ORDER SHOULD BE MADE RETURNING VEHICLE TO OWNER.

G.'s motor vehicle was seized by police on the basis that the vehicle was not the vehicle it purported to be. A further inspection by a police officer from the Organised Stolen Motor Vehicle Squad prompted the statement that the vehicle displayed "all the trademarks of a re-identified vehicle which is commonly known as the 'rebirthing' of vehicles." An application for a warrant was granted by a magistrate directing that the vehicle be retained for the purposes of use as an exhibit and for forensic analysis. G. applied to the court for an order for the return of his vehicle.

HELD: Claim for relief dismissed.

1. Insofar as the lawfulness of the initial seizure is in issue, the applicable principles are:

(i) The police must have reasonable grounds for believing that a serious offence has been committed;

(ii) The police must have reasonable grounds for believing that the vehicle is either the fruit of the crime, the instrument by which the crime was committed or is material evidence to prove the commission of the crime;

(iii) The police must have reasonable grounds to believe that the person in possession of the vehicle has committed the crime or implicated in it;

(iv) The police must not keep the vehicle for any longer than is reasonably necessary to complete their investigations or preserve it for evidence;

(v) The lawfulness of the conduct of the police must be judged at the time, not by what happens afterwards.

***Ghani & Ors v Jones* [1970] 1 QB 693; [1969] 3 All ER 1700; [1969] 3 WLR 1158, applied.**

2. It is difficult to believe that the police did not have reasonable grounds in initially seizing the vehicle. Further there was no basis for concluding that the warrant was not validly issued by the magistrate or that the directions given were not validly given.

3. Whilst the loss of possession of the vehicle may cause hardship to G., this consideration is countervailed by the risk that evidence will be lost or destroyed if the vehicle is removed from police custody. Accordingly it was not appropriate to restrain the police officer from disposing of the vehicle nor to constrain the steps which may be taken by way of forensic analysis.

OSBORN J:

1. On 28 March 2003 I gave an *ex tempore* judgment in this matter which was not transcribed, and I indicated to the parties at that time I would subsequently provide written reasons for my decision. These written reasons do not differ in substance from what I said on that date.

2. The plaintiff in this matter seeks an order for the return to him of a motor car.

3. The defendant is a Detective Senior Constable of Police. On 6 March 2003 she was advised by a Licensed Vehicle Identification Validation Inspector (whom I shall refer to as the VIV Inspector), that in his opinion the car which he had inspected on that day, was not the same vehicle as that which it purported to be.

4. More particularly, the VIV Inspector formed the opinion and advised the defendant that the car was not that which had been written-off by VicRoads on a prior date and had been given the Vehicle Identification Number which the car he inspected bore.

5. Consequent upon this advice from the VIV Inspector, the defendant formed the opinion that the vehicle was in all probability stolen and seized the car and conveyed it to the Caulfield Police Station. Thereafter, following a dispute as to the propriety of this course of action, the plaintiff issued these proceedings by way of writ on 13 March 2003 alleging wrongful seizure and detention of the car.

6. On 12 March 2003 Detective Senior Constable Teesdale of the Organised Stolen Motor Vehicle Squad inspected the car. He is part of a "vetting crew" assigned to deal with initial complaints concerning vehicles which are suspected to be re-identified stolen vehicles.

7. Detective Senior Constable Teesdale states:

> "The vehicle had previously been declared as a repairable write-off by the insurance company. During the inspection of the vehicle I noted that the date coding of vehicle components was not consistent with the build plate date, this means that components on the vehicle had been manufactured after the date the vehicle had been built. The plates had also been removed from the vehicle and refitted at some stage. The Vehicle Identification Number on the fire wall of the vehicle appeared to have been altered by over-stamping some of the characters. The vehicle also had signs of repair in the rear footwell of the passenger compartment not consistent with the original damage. The vehicle was displaying all the trademarks of a re-identified vehicle which is commonly known as the 'rebirthing' of vehicles. I informed Detective Senior Constable Brown of my findings."

8. The defendant said she received this advice on 18 March 2003 and consequent upon it she sought and obtained a warrant under s465 of the *Crimes Act* 1958 to allow the car to be held in police custody and to be analysed by the State Forensic Laboratory.

9. Following the issue of the warrant and its execution, direction was obtained from a Magistrate endorsing, pursuant to s78 of the *Magistrates' Court Act* 1989, the retention of the vehicle for the purposes of use as an exhibit and for forensic analysis.

10. The proceeding before me is by way of summons seeking interlocutory orders in the nature of injunctions including an order for return of the car.

11. For reasons which I will set out below I do not believe the question of custody of the car turns on the lawfulness of its initial seizure. Nevertheless it is appropriate first to observe that I am not satisfied there is a seriously arguable case that the initial seizure of the car was beyond power. Whatever may be the true identity of the car, the documents before me establish a strong case that the defendant acted reasonably and in accordance with her common law powers in seizing it. Counsel for the defendant referred me to the decision of Lord Denning in *Ghani & Ors v Jones*[1]. In that case Lord Denning exemplified the relevant principles as follows:

> "The decision causes me some misgiving. I expect that the car bore traces of its impact with the brick wall. The police had reason to believe that Lynn and Waterfield were implicated in a crime of which the marks on the car might be most material evidence at the trial. If Lynn and Waterfield were allowed to drive the car away, they might very well remove or obliterate all incriminating evidence. My comment on that case is this: The law should not allow wrongdoers to destroy evidence against them when it can be prevented. Test it by an instance put in argument. The robbers of a bank 'borrow' a private car and use it in their raid, and escape. They abandon it by the roadside. The police find the car, i.e., the instrument of the crime, and want to examine it for finger prints. The owner of the 'borrowed' car comes up and demands the return of it. He says he will drive it away and not allow them to examine it. Cannot the police say to him: 'Nay, you cannot have it until we have examined it?' I should have thought they could. His conduct makes him look like an accessory after the fact, if not before it. At any rate it is quite unreasonable. Even though the raiders have not yet been caught, arrested or charged, nevertheless the police should be able to do whatever is necessary and reasonable to preserve the evidence of the crime."[2]

12. Lord Denning went on to identify principles which can be deduced from authority as follows:

> "*First*: The police officers must have reasonable grounds for believing that a serious offence has been committed – so serious that it is of the first importance that the offenders should be caught and brought to justice. *Second*: The police officers must have reasonable grounds for believing that the article in question is either the fruit of the crime (as in the case of stolen goods) or is the instrument by which the crime was committed (as in the case of the axe used by the murderer) or is material evidence to prove the commission of the crime (as in the case of the car used by a bank raider or the saucer used by a train robber). *Third*: The police officers must have reasonable grounds to believe that the person in possession of it has himself committed the crime, or is implicated in it, or is accessory to it, or at any rate his refusal must be quite unreasonable. *Fourth*: The police must not keep the article, nor prevent its removal, for any longer than is reasonably necessary to complete their investigations or preserve it for evidence. As soon as the case is over, or it is decided not to go on with it, the article should be returned. *Finally*: The lawfulness of the conduct of the police must be judged at the time, and not by what happens afterwards."[3]

13. Lord Denning's statement was applied recently by the New South Wales Supreme Court[4], and whilst there has been some debate as to its appropriateness in the Federal Court (see *Challenge Plastics Pty Ltd v Collector of Customs* [1993] FCA 247; (1993) 42 FCR 397; 115 ALR 149 and *Puglisi & Anor v The Australian Fisheries Management Authority & Ors* [1997] FCA 846; (1997) 148 ALR 393 a decision of Justice Hill, 28 August 1997) I am satisfied that, insofar as the lawfulness of the initial seizure is in issue, the principles set out by Lord Denning are applicable here.

14. In my opinion it is difficult to conclude that the defendant did not have reasonable grounds within the terms of these principles in making the initial seizure of the car. In the present case, however, even if such initial seizure were beyond power, the car is now held pursuant to a warrant issued on the basis of further investigation and it is the continued retention of the car which is the real issue before the Court.

15. There is no basis on which the Court could conclude that the warrant was not validly issued by a Magistrate or that the subsequent directions given by another Magistrate were not validly given. The evidence before both the first Magistrate and the second Magistrate is not itself evidenced before me. It cannot be concluded that either of them acted on other than reasonable grounds. I also note that the pre-condition to the exercise of the relevant powers under s465 is a reasonable belief as to a state of facts, not the actual existence of that state of facts. Furthermore, the power exercisable under s78 of the *Magistrates' Court Act* as to the custody of the car is a discretionary one exercisable "consistently with the interest of justice". The exercise of such a power is one which a superior court should respect save in cases of manifest error.[5]

16. I should add, however, that it would appear clear the provisions of the *Magistrates' Court Act* entitle the plaintiff to himself make further application under s78(6) to that Court with respect to the ongoing custody of the car if he so chooses. It is apparent that the terms of the section give the Magistrate the power to address the justice of the situation on an ongoing basis.

17. In assessing the plaintiff's application to this Court, I am required to have regard to the substance of the dispute not only with respect to whether there is a serious question to be tried but also to the balance of convenience. Whilst I accept that loss of possession of the car is causing the plaintiff hardship this consideration is countervailed by:

(a) the risk that evidence will be lost or destroyed if the car is removed from police custody; and

(b) the availability of an alternative remedy by way of supervision of the warrant through the Magistrates' Court.

18. It follows that the principal claim for relief in the summons must be dismissed and in my view the alternative claims must also fail:

(a) It is unnecessary to restrain the defendant from disposing of the car; and

(b) It is not appropriate for this Court to constrain the steps which may be undertaken by way of forensic analysis.

19. During the course of the hearing before me, I raised with counsel for the defendant the question whether a further intermediate investigation of the identity of the car could be

undertaken by reference to the relevant VicRoads Report or alternatively the relevant insurance records. I reiterate my comment that it seems desirable in the interests of justice that such further intermediate investigation be undertaken if that is practicable.

20. The summons in this matter will be dismissed.

21. Having regard to the history of the matter and the sequence of events that has occurred I propose to reserve costs.

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[1] [1970] 1 QB 693; [1969] 3 All ER 1700; [1969] 3 WLR 1158.
[2] at 708.
[3] at 709.
[4] see *Greer v New South Wales Police* [2002] NSWSC 356; 128 A Crim R 586.
[5] *House v R* [1936] HCA 40; (1936) 55 CLR 499; 9 ABC 117; (1936) 10 ALJR 202.

APPEARANCES: The plaintiff Goldberg appeared in person. For the defendant Brown: Mr M Grinberg, counsel. Victorian Government Solicitor.
