08/83

SUPREME COURT OF VICTORIA

HENGEL v ARMSTRONG

Crockett J

11 February 1982

CRIMINAL LAW – ACCUSED CAUTIONED – SILENT WHEN QUESTIONED – FAILURE BY ACCUSED TO GIVE EVIDENCE – WHETHER INFERENCES CAN BE DRAWN.

A. together with 2 others had been lodging in a house owned by a woman proprietor. When A. and his 2 companions. left the premises, they took not only their own possessions, but some belonging to the proprietor. They went to live at 44 Laurel Grove, Doveton and when police ascertained their whereabouts, and A. was questioned about the missing property, he said that it must have been removed in error. The police officer Gannon then warned A. that any answers he might give, could be used in court proceedings against him. A. then answered all of the ensuing questions. Shortly after, A. was arrested and told that he was not obliged to say anything; A. then answered some questions and refused others. He was later charged, found guilty of theft and convicted. On order nisi to review—

HELD: Order nisi absolute.
(1) When an accused has been cautioned, he has a right to remain silent; and such silence cannot afford the basis of the drawing of an adverse inference in relation to guilt or to any fact which might establish an element of the offence.

(2) It is not open to a Court to find guilt based only upon an inference drawn from a failure on the part of an accused himself to give evidence at the trial.

CROCKETT J: *[After setting out the facts, His Honour continued]:* At the close of the case for the Crown a submission was made that there was no case to answer, and according to the uncontradicted evidence in the affidavit sworn on behalf of the applicant in the proceedings before me the Stipendiary Magistrate constituting the Magistrates' Court who had heard the proceedings involving the applicant said: "An inference of guilt could be drawn from the defendant's silence at 44 Laurel Grove when in the company of Alan Gannon." Gannon is the name of the police officer who conducted the interrogation to which I have just been making some reference.

The defence was then gone into. It consisted of the evidence of the woman at whose home the applicant had been living before going to the house from which it was said that articles had been wrongly taken. The gist of the evidence of this witness was to the effect that some one or more of the articles said to have been stolen by the applicant were similar to those which were in his possession whilst he was at the witness' home. The suggestion, of course, was that the articles were his and he had had them in his possession before the date of any alleged theft. The applicant himself did not testify and no other witness was called on his behalf.

The Magistrate thought this witness was honest but mistaken. Her evidence, accordingly, was held by him to be of no assistance to the applicant. In addition to making that finding, the Magistrate said, in order to dispose of the matter, that he was entitled to, and in fact did, draw an inference of guilt, both from the defendant's silence whilst in the presence of Gannon at 44 Laurel Grove and his failure to give evidence at the trial. It is these two statements which are said to have been misdirections in law that have served to vitiate the proceedings which led to the applicant's being convicted, as, indeed, he was, and a penalty being imposed upon him.

The applicant has obtained an order to review the conviction on two grounds. The first is that the Magistrate was wrong in law to draw inferences of guilt from the defendant's silence after he was cautioned and the second ground is that the Magistrate was wrong in law to draw an inference of guilt from the defendant's silence at his trial. It is difficult to know whether the grounds are meant to convey a complaint that the alleged wrongness in law arose from some misdirection as to the correct principles to be applied or the wrongness in law arose from the drawing of an inference in circumstances where there was an insufficiency of evidence to allow that inference

to be drawn. In fact each ground was relied upon in each of those possible alternative ways in which each could be read.

I think each around has in fact been made out. With regard to the first ground, if what the Magistrate meant was that silence would permit the inference of quilt when a submission of no case to answer was advanced, then he was clearly wrong because the question was not one of inference of guilt but whether inferences could be drawn as to the existence of facts which, if believed, would be sufficient to establish guilt. Mere silence alone is insufficient to establish a guilt. It may be that the point is no more than semantic and that, as is contended for by the respondent, what the Magistrate said should be construed as meaning that he was holding at the close of the case for the informant that the evidence would permit the drawing of an inference so as to establish facts which, if believed by the tribunal, would enable guilt to be established. Furthermore, it is to be noted the Magistrate was not saying that an inference of guilt 'would' be drawn or 'should' be drawn, but only that it 'could' be drawn.

However, the real difficulty, I think, that arises in connection with the Magistrate's ruling at this stage of the proceedings is that there is no indication as to what is the alleged silence during an interrogation that occurred whilst the applicant was at 44 Laurel Grove that could be the basis for the drawing of any inference of any kind adverse to the applicant. Silence in the face of an accusation when it might be reasonably thought that some denial of, or answer to, that accusation should be forthcoming from he who is accused may afford the basis for drawing an inference adverse to that person. But that may be done only when the person questioned is not immune from the obligation to answer questions. That immunity does arise following a warning given by a police officer, at least a warning which incorporates the statement that the suspect is not required to answer any questions.

Even if, as presumably he was, the Magistrate were justified in treating the applicant as having no such immunity after the first warning was given because it did not include any statement to the effect that the applicant was not obliged to answer questions, the fact would appear to be that no silence was maintained until the time of arrest when a second warning was given which did incorporate a statement to the effect that no questions asked need be answered. Thereafter the applicant, as already indicated in the resume of the police evidence that I have given, chose to answer some questions but with respect to others he either avoided giving an answer by making some equivocal observation or he completely abstained from answering the question.

It seems to me, therefore, that anything that might be properly characterised as silence in the face of questioning whilst at 44 Laurel Grove was silence when the applicant had a perfect right to be silent. If that is so, such silence cannot afford the basis of the drawing of any inference adverse to him with respect to a fact which, if accepted, might establish, or tend to establish, an element of the offence. Still less could it be used as a basis for drawing an inference of guilt. It seems, therefore, whether by way of misdirection as to law, or because of an inadequacy of the evidence to justify the conclusion reached, that the reasons for finding a case to answer cannot be supported. It may be a question as to whether the fact that the application for dismissal on the basis that there was no case to answer was not properly dealt with; it afforded no miscarriage of justice to the applicant because he chose then to go into his defence. On the other hand, there is, I think, something in the argument to the effect that he was deprived of an opportunity he should have had, if the matter had been properly dealt with, of a favourable finding on his application, namely, the dismissal of the matter on the basis that there was no case to answer and that deprival led to a situation in which the defence, having been gone into, revealed that the applicant himself was not prepared to testify. That absence from the witness box of the applicant to give evidence on matters which may have afforded him a defence was a matter that was relied upon by the Magistrate at the close of the whole of the evidence for finding the applicant guilty of the offence of theft.

I am disposed to think, therefore, that if there were no more, the risk of an injustice is sufficiently great as to require a re-hearing. However, I am fortified in the view that that is the correct course by the fact that when, at the close of the evidence, he found the applicant guilty the Magistrate had further misdirected himself – the misdirection stemming from what he described as an inference of guilt drawn by him both from the applicant's silence when questioned by Gannon at 44 Laurel Grove and also his failure to give evidence at his trial. The resting of any

such inference upon silence whilst being questioned by Gannon has all of the faults to which I have already referred. Furthermore, it is not open to a court to find guilt proved by inference drawn from a failure to give evidence at the trial. Where a person may be thought to be in possession of information that could throw light on a matter in issue chooses not to go into the witness box, his refusal to testify may be used to resolve doubts and difficulties about other matters of evidence in a way that is adverse to that person, or it may enable the court more boldly to draw an inference so as to prove a fact which is adverse to the applicant where otherwise it might not have been so prepared. The proof of guilt is not possible only by use of the process of inference drawn simply from a failure on the part of an accused himself to give evidence, yet this is what the Magistrate has said is what he did in order to reach the conclusions he did.

For the respondent it was said that that process of the Magistrate's reasoning when analysed really meant no more than what he had done was permissible in the circumstances. It was said also that in any event there was evidence which would support a finding of guilt, and that it was clear enough that having regard to the attitude he had formed about the evidence, the Magistrate was prepared so to find. I do not think these answers are sufficient to prevent the order nisi's being made absolute. I think there is ground for an uneasy feeling that justice may not have been done by the approach which was adopted and which, in my view, was impermissible. Certainly, insufficient attention has been given in relation to the interrogation as to what answers were met with silence and as to those with respect to which the applicant was silent were questions to which he was entitled to adopt an attitude of silence without any adverse inference being drawn against him. I think the result is unavoidable that the order nisi should be made absolute, each of the grounds relied upon having been made out, and that the proper course is that the conviction and penalty be set aside, and that the information be remitted to the Magistrates' Court, to be re-heard before another Stipendiary Magistrate.
