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SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v COTTRELL

Starke, Newton and Dunn JJ

15 December 1976 — [1983] VicRp 11; [1983] 1 VR 143

CRIMINAL LAW – RECEIVING STOLEN GOODS – MOTOR CAR PARTS – PROPERTY LOCATED IN PREMISES OWNED AND OCCUPIED BY DEFENDANT – POSSESSION (EITHER PHYSICAL OR BY CONTROL OVER AGENT IN POSSESSION) – DOCTRINE OF "RECENT POSSESSION" – "CIRCUMSTANTIAL EVIDENCE": *CRIMES ACT* 1958, S88.

In a case where a charge of dishonestly receiving stolen goods has been laid, the Crown must prove that the defendant took possession of the goods either physically, or by exercising control over them by the agency of others. It is sufficient proof to show that the defendant was in possession, if it is shown that the goods were in the actual possession of a person over whom the defendant had control, to the extent that the goods would be forthcoming upon his (the defendant's) request. The doctrine of "recent possession" is relied upon and discussed. Circumstantial evidence is also relied upon and discussed.

STARKE J: I will ask Newton J to read the first judgment.

NEWTON J: On 1st October 1976 the applicant, David Mervyn Cottrell (whom I shall call "Cottrell") was presented in the County Court at Melbourne together with two other accused, namely Neil David Reed (whom I shall call "Reed") and Frederick Daniel Sumner (whom I shall call "Sumner"). There were eleven counts in the presentment. Two of them, namely 9 and 10, resulted in verdicts of acquittal and are not relevant to any of the matters with which this Court is now concerned.

By count 1 Cottrell, Reed and Sumner were jointly charged with stealing a Ford Falcon GT motor car belonging to one Smith on 14th October 1974. I shall call this motor car "Smith's car". By count 4 Cottrell, Reed and Sumner were jointly charged with stealing a Ford Falcon GT motor car belonging to one Lofitis on 3rd November 1974. I shall call this motor car "Lofitis' car". By count 7 Cottrell, Reed and Sumner were jointly charged with stealing a Ford Falcon motor car belonging to one Saw on 6th November 1974. I shall call this motor car "Saw's car".

Pausing here it is convenient to say that Cottrell, Reed and Sumner were each acquitted by the jury on each of the counts so far referred to, that is counts 1, 4 and 7. By each of counts 2, 5 and 8 in the presentment Cottrell was charged with dishonestly receiving stolen goods, knowing or believing them to have been stolen. He was found guilty upon each of these counts, and now applies for leave to appeal against the convictions. These three counts, namely counts 2, 5 and 8 were laid under s88 of the *Crimes Act* 1958. The goods referred to in count 2 comprised certain specified items, which were alleged by the Crown to have been part of Smith's car, including car seats, bonnet, battery, glove box, carburettor, speedometer and alternator. The goods referred to in count 5 comprised certain specified items, which were alleged by the Crown to have been part of Lofitis' car, including tachometer, steering wheel, air conditioning unit, console and a wheel and tyre. And the goods referred to in count 8 comprised certain specified items, which were alleged by the Crown to have been part of Saw's car, including steering wheel, glove box, rocker cover, wheels and tyres, a bumper bar and a parking and indicator light.

By count 3 Sumner was charged under s88 with dishonestly receiving stolen goods, namely car seats from Smith's car, knowing or believing them to have been stolen. He was found guilty on that count. By count 6 Reed was charged under s88 with dishonestly receiving stolen goods, namely the tachometer from Lofitis' car, knowing or believing it to have been stolen. Reed was found guilty on that count. By count 11 Reed and Sumner were jointly charged under s88 that

they:

> "....dishonestly undertook or assisted in, or arranged to undertake or assist in, the retention removal disposal or realisation by or for the benefit of David Mervyn Cottrell stolen goods namely a quantity of car parts knowing or believing the same to have been stolen."

They were each found guilty upon this count. The evidence led by the Crown on this count was to the effect that the car parts in question came from Smith's car, Lofitis' car and Saw's car. In my opinion, Cottrell's application for leave to appeal against conviction ought to be dismissed, and his application for leave to appeal against sentence ought also to be dismissed. It is convenient to deal first with the application for leave to appeal against conviction. There are four grounds of appeal, but the fourth ground was abandoned at the hearing. The other three grounds are as follows:

> "(i) The learned Trial Judge failed to direct the jury adequately, alternatively misdirected the jury, as to the conceit of possession.
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> (ii) The learned Trial Judge failed to direct the jury adequately, alternatively misdirected the jury, as to —
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> (a) the inferences to be drawn from the evidence;
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> (b) circumstantial evidence.
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> (iii) The learned Trial Judge misdirected the jury as to the use it could make of the evidence of the witness Jones."

Having regard to the limited character of these three grounds, it is unnecessary to review the evidence in detail. For the most part a brief summary will suffice, although there are some matters which must be dealt with in greater detail.

It was established by the evidence that on the dates specified in counts 1, 4 and 7 respectively Smith's car, Lofitis' car and Saw's car respectively were each stolen by some unidentified person or persons, and that those motor cars were found not long afterwards in remote localities, stripped of many of their parts and fittings. On 14th November 1974, police officers went to a house property at 26 Riverview Crescent, Doveton, which was owned and occupied by Sumner, and at which Reed was a boarder. They found a large wooden packing box at the rear of the premises which contained car parts; outside the box (which I shall call "the Sumner box") there were tyres, wheels and other car parts and fittings. Included in these various car parts and fittings in or near the Sumner box were parts and fittings which were identified in evidence by Smith, Lofitis and Saw respectively as having come from Smith's car, Lofitis' car and Saw's car respectively; the parts and fittings so identified were parts and fittings included in those specified in counts 2, 5 and 8. In addition the police officers found a tachometer in Reed's bedroom which was later identified by witnesses as having come from Lofitis' car, and which is the tachometer referred to in counts 5 and 6. I shall call it "the Lofitis tachometer". On 21st November 1974, Smith inspected a motor car belonging to Sumner, and he identified the front seats as having come from Smith's car. These seats were included in the parts and fittings specified in count 2, and were also the subject of count 3. I shall call them "the Smith car seats".

The evidence so far summarised formed the basis of the Crown case against Reed in relation to counts 6 and 11, and the basis of the Crown case against Sumner in relation to counts 3 and 11. There was other evidence also in relation to those counts, both on behalf of the Crown and on behalf of Reed and Sumner, both of whom gave evidence on oath, as did Sumner's wife. In the end, as earlier stated, Reed was found guilty on counts 6 and Sumner was found guilty on counts 3 and 11. But this Court is now concerned only with the convictions of Cottrell on counts 2, 5 and 8. At all material times Cottrell lived in a house at Noble Park, where he conducted a business, part of which consisted in selling car parts obtained from wrecked cars. He was well acquainted with Sumner and Mrs Sumner, and he had met Reed.

In order to establish the case against Cottrell in relation to each of counts 2, 5 and 8 the Crown had to prove *inter alia* that items referred to in each of those counts had been in the possession of Cottrell: see for example, *R v Deakin* [1972] 3 All ER 803; (1972) 1 WLR 1618 at p1623; and *Halsbury* 4th ed. Vol. 11 para. 1293, p696. As will have been seen from the evidence so far recounted, all these items other than the Lofitis' tachometer and the Smith car seats were

initially discovered in or near the Sumner box, not in Cottrell's physical possession at all. And, as will appear in a moment, there was evidence from Reed that the Lofitis tachometer had originally been in the Sumner box, and there was evidence from Sumner that the Smith car seats had originally been on the ground near the Sumner box.

In the end the principal evidence upon which the Crown relied for the purpose of establishing that Cottrell had had possession of items referred to in each of counts 2, 5 and 8 was the following evidence:

> (1) Sumner said in the course of his evidence that some time in October 1974 Cottrell telephoned him and asked him if he could leave "some stuff' at Sumner's place. Sumner told Cottrell that he could. Later, car parts and fittings arrived at Sumner's house and were placed in or near the Sumner box. Sumner said that the Sumner box itself belonged to him. Sumner did not see who brought the car parts and fittings, although he once saw a utility arrive. Sumner had believed that all the car parts or fittings in or near the Sumner box belonged to Cottrell. He said that with Reed's assistance he had made a list of the parts in the box at Cottrell's request, and this was confirmed by Reed in his evidence.
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> (2) Mrs Sumner said that on one occasion she had spoken to Cottrell on the telephone and told him that the tarpaulin had blown off the Sumner box, and that Cottrell's stuff might be getting wet; she said that Cottrell had replied that he would put the tarpaulin on next time he came round. Mrs Sumner said that the first load of car parts for the Sumner box arrived in a blue utility with two men, but that later the parts in the box had appeared to increase in quantity. She said that before the utility arrived the box was empty.
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> (3) Sumner said in evidence that the Smith car seats were originally near the Sumner box and that they were fitted in his car by Cottrell, from whom he bought them for $60.
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> (4) Reed said that he had taken the Lofitis tachometer from the Sumner box. He said that he had wanted a tachometer for his own car, and that Cottrell had told him that if there was a tachometer in the box, then he could have it for $35.

In addition to the evidence just summarised, there was other evidence of a less substantial character upon which the Crown relied for the purpose of establishing that Cottrell had had possession of items referred to in counts 2, 5 and 8. It is unnecessary to discuss this evidence, save for the evidence of the witness Jones, which is the subject of the third ground of appeal, and to which I shall later refer. I may say that in his own evidence Cottrell sought to deny, qualify or explain the evidence upon which the Crown relied to establish his possession of the items in question; but Cottrell's evidence on these matters does not read convincingly in the transcript, and it is clear that the jury rejected it. The learned Judge in the course of his charge gave a careful warning to the jury as to Sumner and Reed being accomplices and as to the dangers of acting on their evidence without corroboration.

I now turn to the first ground of appeal, the terms of which have already been set out. The principal directions in the learned Judge's charge about the concept of possession were as follows:

> "You have heard a good deal about possession in this case, and what I say about it now applies to each of the accused. Possession consists in the physical control of something coupled with an intention to exclude others from it. For that to be so, you need not have the object in your pocket or in your handbag. For example, a person is in possession of his motor car though it may be parked down the street somewhere. A person is in possession of articles he may have at a place physically separated from where he is, so long as he has the power of control over those articles and the ability to exclude others from them. You are in possession of your property that might be in your home even though you are in here sitting in the jury box. So you may be in possession of something although you have not actual manual possession or touch of the article. You are entitled to find that Mr Cottrell was in possession of the car parts here in question if you find that they were in the actual possession of a person over whom Mr Cottrell had control so that they would be forthcoming on his request. Furthermore, possession need not be exclusive but may be shared with another or others. The Crown case is that the physical objects which were the dismembered parts of the stolen motor cars, the subject of the charges, were in the actual possession of Mr Sumner or of both Mr Sumner and Mr Reed, and that they came into such actual possession of those – that gentleman or those gentlemen – as the result of a conscious direction by Mr Cottrell who had control of them in the first place. He had the power to send them there, and he retained control of them. He had the

> power to call for them. The Crown says that Mr Cottrell sought and was granted permission to leave the car parts with Mr Sumner, and after that he sent them to Mr Sumner. They arrived at Sumner's household, not by accident but as a result of Mr Cottrell's direction. And it was put that the goods were available to Mr Cottrell on his demand, and that he had free and constant access to them, either personally or by his agents. He could send men along to deliver them and he could send men along to take theme And to prove all that, the Crown relies on the evidence of Mr Reed and the evidence of Mr Sumner and the evidence of Mrs Sumner, and the evidence of Mr Jones and of the police."

I may add that at a later stage in his charge His Honour said this:

> "Now, as far as these alternative counts of receiving are concerned that have been made against Mr Cottrell, the Crown in each instance must prove Mr Cottrell otherwise than in the course of stealing knowing or believing the car parts concerned in the particular count you are considering to be stolen goods dishonestly received them into his possession. The Crown must prove that he took possession of the goods, either physically or by exercising control over them by the agency of others having, at that time, the state of mind mentioned. He would not do that if without such control he merely directed another or others to take things to Sumner's house. He must be found to have had dominion over theme And in that latter instance he may be guilty of the crime charged against Mr Reed and Mr Sumner in count eleven but nowhere on this presentment is Mr Cottrell charged with that crime."

In my opinion all these directions by His Honour were correct. It was submitted by counsel for Cottrell that in the circumstances of the present case possession by Cottrell of the items in question required more than that the items should be in the physical possession of Sumner, and that Cottrell should have control over the items through the agency of Sumner, in that the items would be made available to Cottrell by Sumner on demand. It was submitted that either Cottrell must initially himself have had physical possession of the items, or else his relationship with Sumner must have been a relationship which by its nature involved a high degree of control over Sumner, such as the relationship of master and servant.

No authority, however, was cited which supported these propositions, and I believe that none exists. On the other hand there is strong authority in support of the directions given by the learned Judge, and in particular the direction, "You are entitled to find that Mr Cottrell was in possession of the car parts here in question if you find that they were in the actual possession of a person over whom Mr Cottrell had control so that they would be forthcoming on his request." This direction was the subject of particular criticism by counsel for Cottrell.

In *Archbold* 36th ed. (1966) para 2096, it is stated:

> "The actual manual possession or touch of the goods by the prisoner, however, is not necessary to the completion of the offence of receiving; it is sufficient if they are in the actual possession of a person over whom the prisoner has a control, so that they would be forthcoming if he ordered it."

In *Towers & Co Ltd v Gray* (1961) 2 QB 351; [1961] 2 All ER 68 it was held that for the purpose of legislation making it an offence for a person to have in his possession for the purposes of trade goods to which a false trade description was applied, the concept of possession included the case where the defendant's goods were held by a third party in its store, pursuant to an agreement with the defendant under which the goods could be withdrawn from the store on demand. The judgment of the Court was delivered by Lord Parker CJ. After reviewing relevant authorities, His Lordship said that:

> " ... both in the commercial world and in connection with the criminal law, 'possession' has been given a broad interpretation covering something more than actual physical possession, covering cases where, at any rate, a man has the right on demand to recover goods from a bailee."

(The underlining is mine.

This authority is of particular relevance in the present case since it was a reasonable inference from the evidence of Sumner, Mrs Sumner and Reed that Sumner held the items in question as Cottrell's bailee, on terms that Cottrell could recover them on demand. See too *United States of America and Republic of France v Dollfus Mieg et Cie SA* (1952) AC 582 at pp605 and 611. In *R v, Wiley* (1850) 2 Denison 37, 169 ER 408 Patteson J said (at p48):

> "I don't consider a manual possession or even a touch essential to a receiving. But it seems to me that there must be a control over the goods by the receiver, which there was not here."

See too *R v Berger* (1915) 11 Cr App R 72. In *R v Lovell* (1933) 39 ALR 268 this Court was concerned with the question whether for the purpose of the offence of receiving stolen property, stolen articles, which were found outside the premises of the accused, but covered with sheepskins belonging to the accused, were in the possession of the accused. In the course of his judgment McArthur J said (at p271):

> "He" (that is the trial judge) "nowhere tells the jury (as I think he should have) that the real question is whether those stolen articles were taken into the custody and control of the prisoner, either by the prisoner himself or by someone with his authority and on his behalf; and that that really narrowed itself down to the question whether the sheepskins were placed over the stolen articles by the prisoner or by someone with his authority and on his behalf; because if the jury had been satisfied of that, then they certainly would have been justified in finding that that was done for the purpose of taking the articles into the prisoner's own custody and control, or of securing to him the custody and control which he had already assumed of them."

(The underlining is mine.)

In *Russell on Crime* 12th ed. (1964) Vol 2 p1141, it is stated in relation to the crime of receiving stolen property that:

> "as a general rule it must be shown that the receiver had physical possession of the stolen goods either himself, or through a servant or agent, by his authority or with his knowledge or by the thief acting in concert with him."

(The underlining is mine.) Reference may also be made to Smith *The Law of Theft* 2nd ed. (1972) para 472, p167; Smith and Hogan *Criminal Law* 1st edn (1965) p459; *R v Cryer* [1857] EngR 40; (1857) Dearsly and Bell 324, 169 ER 1025; and *R v Rogers* (1868) LR 1 Crown Cases Reserved 136.

I now turn to the second ground of appeal. As earlier indicated, I consider that this ground ought also to be rejected. This ground must of course be considered in the light of the Crown case against Cottrell with respect to the counts upon which Cottrell was convicted, namely counts 2, 5 and 8. The Crown case against Cottrell respect to those counts depended upon inferences to be drawn from the following evidence:-

> (1) As earlier stated, it was established by the evidence that Smith's car, Lofitis' car and Saw's car were each stolen, and were stripped of many of their parts and fittings.
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> (2) There was direct evidence from Smith, Lofitis and Saw, which the jury must be taken to have accepted, which, together with police evidence, established that parts or fittings from each of those cars, being items specified in Counts 2, 5 and 8, came to be in or near the Sumner box.
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> (3) There was evidence from Sumner, Mrs Sumner and Reed which, if accented (and the jury must be taken to have accepted it), led, in my opinion irresistibly to the conclusion that those stolen car parts or fittings were sent to Sumner's house by Cottrell, not long after the theft of the cars from which they had been taken, and that while in or near the Sumner box they were under Cottrell's control or dominion so as to be in his possession. (No doubt to some extent this conclusion itself depended upon the drawing of inferences and upon circumstantial evidence, and indeed the evidence of the witness Jones, to which I shall later refer, was also relied upon in support of it, But in my opinion the conclusion was so obvious, once the relevant evidence of Sumner, Mrs Sumner and Reed was accepted, that no detailed explanation from the learned Judge about the drawing of inferences and about circumstantial evidence was required in relation to that particular matter.)

The Crown case was that the jury should infer from the evidence just tabulated that when Cottrell obtained possession of the car parts and fittings in question he did so dishonestly, knowing or believing them to have been stolen, and that this inference was strengthened by Cottrell's failure to explain how he came to send the items in question to Sumner's house: (in fact Cottrell denied in his evidence that he himself had sent any of the items to Sumner's house, or that he had had anything to do with them, but the jury must have been satisfied that his denial were false). It was principally in this way that the Crown case against Sumner depended upon inferences and upon circumstantial evidence; in particular it depended upon the doctrine of recent possession, which is itself one example of circumstantial evidence: see, for example *Cross on Evidence* (Australian edition) pp47-48. In fact the Crown also relied on the doctrine of recent possession, and on circumstantial evidence generally, in support of counts 1, 4 and 7 relating to the theft of the three cars, so far as concerned Cottrell. But Cottrell was of course found not guilty on those counts.

In my opinion the learned Judge gave correct and adequate directions to the jury both with respect to the doctrine of recent possession and with respect to circumstantial evidence generally. It is sufficient to set out the following directions, although there were others.

In relation to the doctrine of recent possession His Honour's directions included the following direction:-

> "Insofar as the case that it seeks to make against the accused man Cottrell is concerned, ladies and gentlemen, the Crown once more relies on the doctrine of recent possession in order to establish four charges of stealing or, alternatively, four charges of receiving stolen property knowing it to have been stolen, If a person is proved to have been in possession of property which in all the circumstances may be said to have been recently stolen and he gives no explanation of having been, or of how it was that he came to be, in possession of such recently stolen property, well then a jury, if it sees fit, may find him guilty of stealing the property or, if not guilty of stealing the property, guilty of receiving that property knowing at the time that he received it that it was in fact stolen property. An illustration of that doctrine that you have already heard a lot about, sometimes used in this Court, is the case of a man who misses his gold pocket watch at the football and goes outside the Ground after the match and he sees somebody with his watch. He asks the person what he is doing with it and the person refuses to say. He gives no explanation of the fact that he is in possession of the watch. Well then the owner of the watch might sensibly conclude that that person picked his pocket, or found the watch knowing it belonged to somebody else and that that person could reasonably be discovered and was intending to keep it. In other words, he may conclude that this person is a thief, and, depending on the circumstances, you may have a case which warrants the inference of a person found in possession of recently stolen property. He gives no explanation of that fact. He may be inferred to be a guilty receiver, the person who took possession of the stolen property from the thief knowing that it was stolen property that he was so taking."

In relation to circumstantial evidence His Honour's directions included the following:

> "You will appreciate, too, ladies and gentlemen, that the Crown case against all of the accused on all of the counts is a circumstantial one. And before you would be entitled to convict an accused person on circumstantial evidence you would need to find that that evidence negated any reasonable explanation of the circumstances consistent with the accused man's innocence. There is nothing intrinsically weak about circumstantial evidence as a general proposition; it is the darling of novelists I suppose to write a story about a person who was wrongly convicted on circumstantial evidence. But it is not a criticism of evidence to say that it is circumstantial. Circumstantial evidence may be very powerful. It may be more powerful than the direct evidence of witnesses because the circumstances can't lie. However, they can be mistaken. And it is for you to say, scrutinizing the evidence as to whether it points beyond reasonable doubt to the guilt of the accused."

I may add that in the course of his summary on the Crown case against Cottrell (at transcript pp599 to 605/6) the learned Judge correctly put the way in which the jury could find Cottrell guilty upon counts 2, 5 and 8 by the use of circumstantial evidence and by the drawing of inferences. I may also emphasise that Cottrell's defence at the trial was based primarily on a denial that he was the person who sent the stolen items in question to Sumner's house, not upon any innocent explanation of his having sent them there.

I now turn to the third ground of appeal. As earlier indicated, I consider that this ground also ought to be rejected. The passage in the learned Judge's charge to which this ground is directed was as follows:

> "To show Mr Cottrell's access to the property and control over it, the prosecutor relied upon the evidence of Mr Jones. It was put that Mr Jones was sent down to 26 Riverview Crescent as the agent of Mr Cottrell to collect the tailshaft or whatever it was that he was sent there to collect. Mr Jones said that when he went to Cottrell's place to pick up some money that Mr Cottrell owed him for work that he, Jones, had done, Mr Cottrell asked him to go down and pick up the tailshaft from the accused Sumner. Once there he knocked on the door and he said to Sumner, 'Sumner, David sent me down to pick up a tailshaft.' Sumner replied, being Saturday, the 16th of November, that the shaft was not there, it had been picked up by the police. And the prosecution put it that that is part of the series of facts which show that Mr Cottrell had dominion over this stolen property."

The witness Jones had been called by the Crown, and there is nothing inaccurate about the summary of his evidence which is contained in the foregoing passage. The reason why the learned Judge used the words "or whatever it was that he was sent down there to collect" must,

I think, have been that according to Sumner's evidence Jones asked him for a gearbox, not a tailshaft.

It was submitted by counsel for Cottrell before this Court that the evidence of Jones was incapable of showing Cottrell's access to the items in or near the Sumner box or his control over them. But in my opinion it was open to the jury to regard Jones' evidence as showing just that. For Cottrell's conduct in sending Jones to Sumner's house to get a tailshaft was some evidence of Cottrell's control over other car parts situated at Sumner's house, including stolen car parts; at the least it showed that there was one car part at Sumner's house over which Cottrell had control and the inference was therefore open in all the circumstances of the case that he had control over other car parts there. Whether the jury drew that inference was a matter of fact for them to decide. I may observe that in any event all that His Honour was doing in the passage in question was to summarise a submission put by counsel for the Crown in relation to the question of what evidence could be used by the jury as corroboration of the evidence of Sumner and Reed as to Cottrell's connection with the car parts and fittings in or near the Sumner box. And in earlier passages His Honour had made it quite clear that the question whether Jones' evidence was capable of being corroboration was a question of fact for the jury. His Honour had correctly told the jury that Mrs Sumner's evidence was capable of being corroboration.

I may add that even if (contrary to my own view) Jones' evidence was not capable of showing Cottrell's access to the items in or near the Sumner box or his control over them, I am satisfied that the relevant passage in His Honour's charge either would not have constituted any miscarriage of justice at all, or at all events would not have constituted any substantial miscarriage of justice; see s568(1) of the *Crimes Act* 1958. As earlier emphasised, all that His Honour was doing was to summarise a relatively minor factual submission, which had been put to the jury by counsel for the Crown, and His Honour left it entirely to the jury whether or not to accept the submission. Even if the submission was ill-founded, I am satisfied that its re-statement by the learned Judge could not have deprived Cottrell of a chance of being acquitted, which would otherwise have been fairly open to him: see, for example, *Mraz v R* [1955] HCA 59; (1955) 93 CLR 493 at pp514-5; [1955] ALR 929; *Stokes v R* [1960] HCA 95; (1960) 105 CLR 279 at pp284-5; [1961] ALR 319; 34 ALJR 422; and *R v Nilson* [1971] VicRp 105; (1971) VR 853 at p858-9. For the foregoing reasons, in my opinion both applications ought to be dismissed,

STARKE J: I agree. I am authorised by Dunn J to say that he agrees with the judgment just delivered. The order of the Court is that the applications are dismissed.
