56/84

SUPREME COURT OF VICTORIA

KING v ROWLINGS

Southwell J

28 September 1984

PROCEDURE – CONVICTION FOR UNLAWFUL POSSESSION OF MONEY – SUBSEQUENT ORDER MADE IN RELATION TO UNCLAIMED MONEY – SUCH ORDER MADE IN ABSENCE OF DEFENDANT – WHETHER DEFENDANT ENTITLED TO A REHEARING – WHETHER A "PARTY": *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, SS3, 152; *SUMMARY OFFENCES ACT* 1966, SS26, 33.

K. was convicted of having in his actual possession property suspected of being stolen or unlawfully obtained. Subsequently, an application was made to the Court for an order that the property be paid into the Consolidated Fund, and when K. later became aware that the order had been made, he applied for a re-hearing of the application. The magistrate refused K.'s application on the ground that he was not a party to the original application. On order nisi to review—

HELD: Order absolute.
(1) A conviction for unlawful possession of property does not necessarily decide the question of ownership of the property.

(2) As K. was a party to the proceedings at which he was convicted, then it followed that he was a party to any application for an order disposing of the property, and should have been given notice of the proceedings and an opportunity of being heard.

(3) As K. was a party for the purposes of s152 of *Magistrates (Summary Proceedings) Act* 1975, he was entitled to a re-hearing of the application.

[Note: This case was superseded by MC 2/86; [1987] VicRp 2; [1987] VR 20. Ed.]

SOUTHWELL J: **[1]** This is the return of an order nisi to review a decision of the Magistrates' Court at Melbourne. In October 1982 a police officer named Douglas William Rowlings arrested the applicant and at the same time seized the sum of $88,134 in cash. The applicant was, in respect to that money, charged with an offence pursuant to s26(1) of the *Summary* **[2]** *Offences Act* 1966 of having in his actual possession property suspected of being stolen or unlawfully obtained. In due course the applicant was convicted and an appeal against that conviction was unsuccessful. No order was made either for the return of the money to the applicant or for its forfeiture.

It is to be supposed that in turn the Magistrates' Court and the County Court were not satisfied with the account given to them by the applicant. I was informed on those proceedings that the applicant's account was that he had won the money by gambling. It follows from the conviction that the Court was not of the opinion that the applicant's account was satisfactory. In May of 1984 the applicant became aware that an order had been made by the Magistrates' Court on 10th April that the money be paid into Consolidated Revenue, and it would appear from the present terminology of s33(4) of the *Summary Offences Act* 1966 that the order should have been, if it were right to make it at all, that the money should be paid into and form part of the Consolidated Fund. Section 33(4) reads:

> "If the rightful owner of any such property is not discovered within six months from the conviction of the offender the property may by order of the court be sold and the proceeds of the sale or, in the case of money, the money shall be paid into and form part of the Consolidated Fund."

A certificate of the order made by the Magistrates' Court on 10th April 1984, has been tendered. It follows the form of a certificate of summary conviction or order. The Prosecutor, Informant, Complainant, or Applicant is named as Douglas William Rowlings. The Accused or Defendant **[3]** is named as Peter Lawrence King; that is the present applicant. In the section Charge, Cause, or Proceedings appears:

"Application for Court Order for disposal of goods, money totalling $88,134".

Under the section Decision, Memo of Conviction, or Order appears:

"Order that the money seized be paid to Consolidated Revenue".

Anyone reading that could be excused for believing that the applicant was indeed a person affected by that application and by any order made thereon, and that the applicant was a person who should, as a matter of natural justice, be given notice of the proceedings and an opportunity of being heard. In saying that, I do not wish to be taken as expressing my opinion whether, upon the true construction of s33 of the *Summary Offences Act*, a person could not be "the rightful owner" if he has been convicted in respect to that property of an offence under s26(1). I express no opinion on that matter.

[4] The applicant in due course made application pursuant to s152 of the *Magistrates (Summary Proceedings) Act* 1975, which reads:

> "Where a conviction or order is made by a Magistrates' Court or by a justice or justices not sitting as a Magistrates' Court when one party does not appear, the party who does not appear may subject to and in accordance with the provisions of this Part apply to the Court or, in the case of a conviction or order by a justice or justices not sitting as a Magistrates' Court, the Court in which the conviction or order is recorded for an order that the conviction or order be set aside and that the information or complaint on which it was made be reheard."

The issue which now arises for determination is whether the applicant was a "party" for the purposes of s152. If he was, it is clear that, he not having appeared because he was given no notice of the proceedings, he would in justice be entitled to a re-hearing of the application. The application to set aside the original order and to order a re-hearing was refused, apparently on the ground that the applicant was not a party within the meaning of s152 and that there was no other basis upon which it could be said that he had standing to make such application. Thereafter, application was made to Master Barker for an order nisi to review. In due course that application was refused, and the applicant successfully appealed to this Court, where Gray J granted an order nisi to review on a number of grounds which I think it is unnecessary now to set out. Notices of the proceedings were served on parties interested, but in fact no other appearance has been announced on this proceeding.

There is abundant authority for the proposition that **[5]** conviction under s26 does not necessarily decide the question of ownership of the relevant goods. The matter has not been argued before me and I think it undesirable that I say any more than it is obvious that there are some circumstances in which money may be obtained illegally but nevertheless the person obtaining it may become the legal owner of it. There can be little doubt that the applicant was a party to the proceedings at which he was convicted. In those proceedings an order for restitution might have been made if the identity of the rightful owner had been established (see s33(3) of the *Summary Offences Act*). It would seem to me to be a startling proposition that a person in whose possession a large sum of money is found was not said to be a party for the purposes of some application in which an order is sought as to the disposition of that money. In my view, the applicant is a party within the meaning of s152. I observe that the definition of "order" in s3 of the *Magistrates (Summary Proceedings) Act* includes adjudication of any application, and upon any view I would have thought that the application made by the respondent to the Melbourne Magistrates' Court on 10th April 1984, was an application within the meaning of s3. To refuse the applicant standing in that application was, in effect, to say that no other person was interested in the application.

In reaching that conclusion, I am emboldened by my belief that by some means or another the applicant should be given the right to be heard on an application for the disposal of the money. If I were wrong in my finding that the applicant was a party within the meaning of s152 of the **[6]** *Magistrates (Summary Proceedings) Act*, it would appear that his only redress would be by way of prerogative writ, and I would think little purpose would be served by forcing him to take that step. It follows that the order nisi should be made absolute. The order made at the Magistrates' Court at Melbourne on 20th July 1984, whereby the applicant's application for a re-hearing was refused, is set aside. The order made at the Magistrates' Court at Melbourne on 10th April 1984, should be set aside and there be a re-hearing of that application.