15/89

SUPREME COURT OF NEW SOUTH WALES

PARKER v TODHUNTER

Yeldham J

31 July 1987 — (1987) 89 FLR 294; (1987) 26 A Crim R 169

CRIMINAL LAW – EVIDENCE – UNLAWFUL POSSESSION – REASONABLE SUSPICION OF POLICE OFFICER – WHETHER CHARGE FAILS IF OFFICER FAILS TO GIVE FORMAL EVIDENCE OF SUSPICION.

The question whether property may be reasonably suspected of being stolen is to be determined objectively by the magistrate hearing the charge. Accordingly, a magistrate was in error in dismissing a charge of unlawful possession on the basis that no police officer gave evidence that the property was reasonably suspected of being stolen.

***Cleary v Hammond* 5 ATR 263; [1975] 1 NSWLR 111; [1974] AEGR 66, applied.**

YELDHAM J: [294 FLR] These are four stated cases by a magistrate under the provisions of the *Justices Act* 1902 (NSW). The appellant was the informant and the respondent the defendant in proceedings in which the defendant was charged with having on his premises various goods which may reasonably be suspected of being stolen or otherwise unlawfully obtained. The charges were laid under s527c of the *Crimes Act* 1900 (NSW), which section replaces and for present purposes is in the same terms as s40(1) of the *Summary Offences Act* 1970 (NSW). The magistrate, at the end of the prosecution case, upheld a submission that because no evidence had been led by a police officer or any other person that at the relevant time he had a reasonable suspicion that the goods the subject of the charges were stolen, for that reason the prosecution must fail. His Worship said that he accepted the law as stated in RS Watson and H Purnell, *Criminal Law In New South Wales* (2nd ed, 1981), Vol 1, par 1321. There the statement appears:

> "there must be evidence of a concrete suspicion entertained by some person that the goods were stolen or unlawfully obtained and where no person deposes to the suspicion the defendant cannot be convicted."

The authority for this statement is said to be two cases in South Australia in 1927. Regrettably the editors of the book did not, in relation to this particular proposition, refer to what is the appropriate authority in this State, namely, the decision of Lee J in *Cleary v Hammond* 5 ATR 263; [1975] 1 NSWLR 111; [1974] AEGR 66. That case is mentioned in the footnotes as authority for other propositions contained in pars 1321 and 1322, but it is plain authority against the proposition contained in the first sentence in par 1321 upon which the **[295]** magistrate, not unnaturally, relied.

In *Cleary v Hammond*, Lee J was concerned with s40 of the *Summary Offences Act* 1970. That, as I have said, is in precisely the same terms as s527c of the *Crimes Act* 1900 which replaced it. After a careful examination of the history of the legislation, relating back as it did to the *Police Offences Act* 1901 (NSW), and to the authorities upon the section as it stood from time to time, particularly *Ex parte Patmoy; Re Jack* (1944) 44 SR (NSW) 351; 61 WN (NSW) 228 and *Purdon v Dittmar* [1972] 1 NSWLR 94, his Honour (at 118) concluded:

> "In the result then, it appears to me that s40, in referring to a thing which 'may be reasonably suspected of being stolen or otherwise unlawfully obtained...' is referring to a conclusion arrived at objectively by a magistrate when all the evidence pointing to the thing being stolen or otherwise unlawfully obtained is before him. It must be proved that, on the date charged, the facts bring the person charged within the particular category s40(1)(a)-(d) charged against him, and then it must be proved that it is open on all the evidence to conclude the goods 'may be reasonably suspected of being stolen...'. The fact that the whole of the evidence relied on at the hearing as showing that the goods 'may be reasonably suspected of being stolen...' is not available to the police at the time they take possession of the goods (as in this case) or at the time of arrest or charge in no way affects the admissibility of evidence obtained thereafter, if that evidence in fact tends to show that the goods 'may be reasonably suspected of being stolen...'."

In *Pittman v Di Francesco* (1985) 4 NSWLR 133, in which I was concerned with another section of the *Crimes Act* 1900, I considered Lee J's decision and applied it, and referred to the fact that it had been expressly approved by the Court of Criminal Appeal in *Carter* (unreported, Court of Criminal Appeal, 9 March 1978). In the present case the magistrate said:

> "there is no doubt in my mind, certainly at the *prima facie* level at any rate, the items referred to, a reasonable suspicion would attach to them being stolen or otherwise unlawfully obtained. However, no person deposed to that, and in that case I must dismiss each information."

In my opinion, applying the principles which Lee J enunciated, and in my respectful submission correctly enunciated, the magistrate fell into error. It is not unnatural that he did so, because he relied upon an erroneous statement in the first sentence of par 1321 in RS Watson and H Purnell's *Criminal Law In New South Wales*. No doubt that paragraph will now be amended. I answer the question in each case in the affirmative. I remit the matters to the magistrate to continue to hear them in accordance with the views that I have expressed and in accordance with law. Although Mr Cowan has asked for costs, there is no doubt that if I do award costs the respondent would be entitled to a certificate under the *Suitors' Fund Act* 1951 (NSW). In the circumstances I make no order as to the costs on the appeals.
