35/89

SUPREME COURT OF VICTORIA — FULL COURT

R v ATAMIAN

Crockett, Gray and Phillips JJ

10 February 1989

CRIMINAL LAW – MAKE FALSE REPORT TO POLICE – "VOLUNTARILY" – PROPERTY DESTROYED – PROPERTY REPORTED TO POLICE AS STOLEN – WHETHER REPORTED VOLUNTARILY: *SUMMARY OFFENCES ACT* 1966, S53(1).

Where a jury accepted that an accused person had arranged for his motor car to be destroyed for insurance purposes and had attended a police station and reported that the car had been stolen, it was open to the jury to find that the accused had made a false report to the police voluntarily (that is, of his own motion and volition and otherwise than in the course of a police interrogation) so as to be in breach of s53(1) of the *Summary Offences Act* 1966.

CROCKETT J: [1] The applicant was presented in the County Court on a presentment which charged him with having made a false report to the police. The charge was laid pursuant to s53(1) of the *Summary Offences Act* 1966. That sub-section is in these terms:

> "Any person who falsely and with knowledge of the falsity of the report voluntarily reports or causes to be reported to any member of the police force that an act has been done or an event has occurred, which act or event as so reported is such as calls for an investigation by a member of the police force shall be guilty of an offence."

It is to be noted that the expression "voluntarily" is defined in sub-s(2) and the definition is in these terms:

> "'Voluntarily', in respect of a report by any person, means—
> (i) of that person's own motion and volition; and
>
> (ii) otherwise than in the course of an interrogation made by a member of the police force."

[2] The gist of the Crown case was that the applicant, who – or whose wife – owned a motor car, through the agency of an acquaintance, caused that car to be destroyed by fire. The stated reason for such action's being taken was that the applicant wished to make a claim upon the insurance company for the value of the car. In accordance with that plan, he attended at the Dandenong Police Station and reported that the car had been stolen. The evidence of Senior Constable Venja, who was on duty at the station at the time in question, was that the applicant arrived at the station and reported the theft of a Commodore sedan motor car. He said that the value of the car was $10,000 and that it was insured, but he did not know the name of the insurance company. Venja deposed to his having later ascertained that the car in question had been located by a police patrol a little earlier, and was found, in fact to have been gutted by fire.

However, in the course of the trial the applicant gave sworn evidence that he had not arranged for the car's destruction, that he was unaware of its being burnt before he went to the police station or having been stolen and he had not attended at the police station to make a report of the car's being stolen. His contention was that the police had obviously discovered the car in its burnt-out condition. Through the records of the Motor Registration Branch they had contacted the applicant and requested him to attend at the Dandenong Police Station to give such details as might be sought concerning the burnt car.

[3] The applicant says that he attended pursuant only to such a request. He made no report to the police, but merely answered such questions concerning the car as were asked of him by a police officer at the station. The transcript of the evidence given at the trial clearly discloses that the only defence or defences relied upon by the applicant in connection with this charge was

that involving knowledge of falsity. It is clear enough, I think, that no issue was really raised as to whether or not the applicant had made a report or, if he did, that it could be properly described as being one made of his own motion and volition, or whether or not it had come into existence in the course of an interrogation made by a member of the Police Force.

Our attention has been drawn to a number of passages in the evidence which it is suggested justify a view that it was open to the jury not to be satisfied beyond reasonable doubt that a report had been made or, if made, was of the applicant's own motion and volition, or was made otherwise than in the course of an interrogation by a member of the Police Force. The Judge, when summing up, referred to the various elements of the offence, pointing out finally that the report had to be made voluntarily. His Honour gave no attention to the definition to be found in the legislation, and plainly enough did not do so because he treated the issue as not being a contested one. His Honour, having outlined each of the elements, then proceeded to deal with **[4]** them briefly so far as those which were considered to be non-contested elements. Coming to the final element, he said:

> "As far as one can see from his evidence, I suggest that it makes it clear that he was not forced by anybody in any way to make that report, so he made it voluntarily. There is your sixth element."

A little later his Honour said:

> "All the other elements seem to be agreed on by everybody, but the issue is there – was it a false report?"

It is now contended that the manner in which the matter was dealt with by the Judge in his charge has been such as to remove the question of fact as to whether a report had been made in conformity with the provisions of the Act as an issue for consideration by the jury. In fact, I do not believe his Honour did anything of the sort. He had, at the outset of his charge, pointed out to the jury that all questions of fact were for them and that any comment of his was one upon which they could act if they saw fit, but otherwise, if they did not agree with it, they were obliged to put it to one side. When dealing with the various elements insofar as they involved questions of fact, the Judge made it clear that matters of fact were for the jury and not for him. Having concluded his reference to the various elements, he said:

> "All right, there seems to be the issue. It is always a matter for you to decide what the issues are."

There is, therefore, I think much to be said for the view that his Honour had never, in fact, removed from the jury's **[5]** consideration the factual matter which it is now contended had been removed, as it were, by the Judge from the jury.

The evidence to which the Court was taken to support the view that it would have been open to the jury to have not been satisfied that a report was not made, or if made was not made voluntarily, was of little if any cogency. I should have thought that the evidence was overwhelmingly in favour of the proposition that the applicant did attend at the police station and that what it was he had to say did constitute a voluntarily made report to the police.

Lest I be wrong about that, I would found the dismissal of the application (which is for leave to appeal against conviction on the ground of misdirection) which I propose should occur, upon the ground that no complaint was made by counsel for the applicant at the time that the Judge concluded his charge. The Judge specifically asked counsel if they had any exceptions. Applicant's counsel said he did not. He had not in any way conducted the trial so as to make the matters to which I have been referring a genuine issue for the real consideration of the jury.

In my opinion, it is altogether too late now, in respect of a matter such as he now seeks to raise, to say of it that the failure of the Judge to have dealt with it as fully as counsel wished should serve to vitiate the trial and that a further trial should, on that account, now be ordered. The rule is clear that it is only in exceptional cases, where exception has not been taken to the subject matter, that **[6]** such an exception could be allowed to be raised for the first time on appeal. The present case involves no miscarriage of justice and, accordingly, in my view the application founded on that ground should fail.

GRAY J: I agree.

PHILLIPS J: I also agree.

CROCKETT J: The order of the Court is the application will be dismissed.

APPEARANCES: For the applicant Atamian: Mr K Wilkinson, counsel. Portelli & Co, solicitors. For the Crown: Mr P Faris QC with Ms JA Perlman, counsel. JM Buckley, Solicitor for the DPP.
