16/89

SUPREME COURT OF SOUTH AUSTRALIA (In Banco)

TEPPER v KELLY

White, Legoe and von Doussa JJ

3 November 1987; 11 April 1988 — (1988) 47 SASR 271; (1988) 36 A Crim R 203

CRIMINAL LAW – UNLAWFUL POSSESSION – REASONABLENESS OF SUSPICION – WHETHER SUCH ELEMENT REQUIRED TO BE PROVED BEYOND REASONABLE DOUBT.

Whilst the reasonableness of a suspicion is an essential element of an unlawful possession charge, a court should not grade the reasonableness by reference to a standard of proof. A suspicion is either reasonable or not reasonable, and it is inappropriate and incongruous to require that the reasonableness of the suspicion be proved beyond reasonable doubt.

Tepper v Kelly **(1987) 45 SASR 340, affirmed.**

(Cf. *R v Tween* [1965] VicRp 89; (1965) VR 687 at 693-4. Ed.)

WHITE J: *[with whom Legoe and von Doussa JJ agreed, after setting out the nature of the charge, the Magistrate's reasons, and part of the judgment of Cox J on appeal, His Honour continued]* … **[272]** The Magistrate then examined the evidence and concluded:

> "In my judgment it was reasonable to be suspicious but I find myself unable to say that I am satisfied beyond reasonable doubt that the suspicion held by Marks was reasonably based."

In his reasons for judgment, Cox J said:

> "Factual elements – most important, the possession and the suspicion – have to be established beyond reasonable doubt. However, it is not appropriate, in my view, to speak of the reasonableness of the suspicion being established beyond reasonable doubt. It is for the court to form a judgment as to whether any suspicion, duly proved, should **[273]** properly be characterised as a reasonable suspicion. Unless the complainant satisfied the court that the suspicion was reasonable the charge will not have been made out, so in that sense it is apt to speak of the complainant carrying the burden of satisfying the court of the reasonableness of the suspicion. But the court's judgment or opinion in that respect, as distinct from the proof of the underlying grounds of reasons, cannot be graded by reference to the standards of proof applicable in different jurisdictions to contested facts. A suspicion is either reasonable or not reasonable. To contrast (as the learned magistrate did here) a suspicion that is reasonable on the balance of probabilities and a suspicion that is reasonable beyond reasonable doubt is to misconceive the requirements of the section."

Cox J then analysed the magistrate's reasons and concluded, correctly in my opinion, that the magistrate clearly intended to say that the court's "qualitative assessment of the suspicion [had to] be in some way pitched at some higher, beyond-reasonable-doubt level. In my opinion, if that is not conceptually impossible, it is certainly conceptually inappropriate." His Honour then proceeded to analyse certain cases which distinguished between the satisfaction by proof beyond reasonable doubt of the court as to the facts upon which the suspicion was said to be based and the formation of a judgment or opinion by the court as to the reasonableness of that suspicion. His Honour concluded:

> "It was enough for him to find, as indeed he expressly did, that it was reasonable for Marks to be suspicious. The test that he went on to apply, whatever precisely it meant, obviously led him in some way to a different result. The error, then, was decisive."

With respect, I agree that the court's judgment or opinion as to the reasonableness of the suspicion "cannot be graded by reference to the standards of proof applicable … to contested facts. A suspicion is either reasonable or not reasonable". To state these propositions is to state the obvious. It is incongruous, even tautologous, in my opinion, to speak of "proof" beyond reasonable doubt of the reasonableness of a suspicion because reasonableness is a matter of opinion or judgment, not proof. That disposes of the onus of proof point.