13/96

SUPREME COURT OF VICTORIA

DPP v COX

Hedigan J

26 February 1996 — (1996) 85 A Crim R 328

CRIMINAL LAW – UNLAWFUL POSSESSION – PROPERTY IN MOTOR CAR – SUSPICION FORMED WHEN CAR OWNER HAD BEEN ARRESTED AND REMOVED FROM CAR – WHETHER OWNER CAPABLE OF EXERCISING CONTROL OVER GOODS – WHETHER GUILTY OF UNLAWFUL POSSESSION OF GOODS: *SUMMARY OFFENCES ACT* 1966, S26.

C. was intercepted by a police officer whilst driving his motor car. A passenger W. was also present. A short time later, C. was arrested by the officer, handcuffed and placed in a police vehicle nearby. As a result of the search of C's vehicle, the police officer found a substantial quantity of property which he reasonably suspected of being stolen or unlawfully obtained. Neither C. nor W. made any admissions as to possession and ownership of the goods. C. and W. were later charged with unlawful possession of the goods. On the hearing, the magistrate upheld a 'no case' submission and dismissed the charge in each case on the ground that neither C. nor W. had physical and actual personal control of the goods at the time of the formation of the police officer's suspicion. Upon appeal—

HELD: Appeal dismissed.
1. At the time the suspicion was formed, C. had been arrested, handcuffed and placed in the police vehicle. In those circumstances, there was no basis for saying that if C. had possessed the goods, he was capable of exercising the power to resume control of the possession of the goods either exclusively or non-exclusively, at his election, will or favour. It could not be said that C. had either legal or actual physical possession of the goods in the vehicle. Accordingly, the Magistrate was correct in dismissing the charges.

***Moors v Burke* [1919] HCA 32; (1919) 26 CLR 265; 25 ALR 213, applied.**
***Rowe v Galvin; McKeown v Hill* [1984] VicRp 26; [1984] VR 350, considered.**

2(a) *Obiter*. In appropriate circumstances, the disconnection between possessor of goods and the goods themselves will not prove to inhibit a finding of actual possession. For example, if C. had been standing unarrested outside the vehicle cleaning the windscreen when the police officer formed the suspicion about the property, then it could hardly be said that C. was not in possession of the car in which the goods were at the relevant time simply because he was standing outside it.

2(b) Neither C. nor W. had admitted ownership or possession of the property. No submission was made as to possession in concert. The case of possession against C. arose solely from his ownership of the vehicle and his control of it. It was open to argue that it was just as consistent to say that, notwithstanding that C. owned the vehicle, the goods were in W.'s possession or conceivably even in his ownership.

HEDIGAN J: [1] This is an appeal pursuant to the provisions of s92 of the *Magistrates' Court Act* 1989 by the Director of Public Prosecutions on behalf of a police officer, Gregory Ross Kitchen (hereinafter called "Kitchen") against the order of the Magistrates' Court at Geelong, the Magistrate dismissing charges laid pursuant to s26 of the *Summary Offences Act* 1966 ("the Act") against Darryl John Cox, who was the respondent in this proceeding, and Keith Bernard Williams, who was a respondent but was not served because of inability to locate him, with the orders made by Master Kings establishing this appeal. The facts in the proceedings before the Magistrates' Court at Geelong and the events which led to the charges under s26 of the Act will be described by me, based upon the affidavits, with the exhibits thereto, of Gregory Ross Kitchen, a member of the Victoria Police Force, of Geoffrey Balchin, another police officer, who presented the case for the prosecution before the Magistrate, and an affidavit of Gavin Meredith, who was counsel appearing at the Magistrates' Court at Geelong for Cox's co-accused, if I might put it that way, Williams. Mr Meredith's affidavit supplements to some extent the facts that emerge from the affidavits of Kitchen and Balchin and describes also the submissions that were made and the reasons for decision of the Magistrate.

The facts of the matter may shortly be described in the following way: On Saturday, 8 April

1995, at about 12.40 in the afternoon, Kitchen was on general patrol duties within the Portarlington and Drysdale areas and received information about a theft of alcohol from the Drysdale Hotel drive-through bottle shop. He went to the **[2]** bottle shop and obtained quite detailed information from the manager there relating to the theft of a bottle of Glenfiddich malt Scotch whisky. The manager was able to give details of the vehicle used by two persons, descriptions of whom were also given, in the course of the alleged theft of the whisky. About an hour later, Kitchen observed a vehicle, a Toyota station wagon, towing a trailer in Portarlington which answered the description of the vehicle given to him by the bottle shop manager, including the registration number. The station wagon entered a Mobil service station. Kitchen then stopped the police vehicle in front of the vehicle and had a number of conversations with the driver, the respondent Cox, and subsequently with the passenger Williams.

The interrogation of Cox extracted information about his name, address and the fact that the Toyota wagon belonged to Cox and was registered in his name. When told that it was alleged that Cox, and, one presumes from the later discussion with Williams, Williams as well, had stolen the Glenfiddich Scotch from the Drysdale Hotel, Cox said he had nothing to say to him. Indeed, Williams said precisely the same thing. Kitchen then arrested Cox, gave him an appropriate warning and asked him whether he had any objection to Kitchen searching the vehicle. Cox said, "No, you can look. He then handcuffed Cox and placed him in the rear of the police vehicle. There were then conversations to much the same effect with Williams, who was also arrested for " theft of the Glenfiddich Scotch whisky; however, Kitchen only had one set of handcuffs which had been used for Cox, so he told Williams to sit down next to the vehicle. Kitchen then conducted a **[3]** routine search of the vehicle, first finding a bottle of Glenfiddich Scotch between the passenger's and driver's seats. He next located a quantity of workshop-type equipment, including welding and cutting and drilling equipment, all of which were brand new, and a substantial amount of other property in the back of the vehicle. He immediately suspected that this was stolen. Another police officer then arrived and assisted.

The affidavit of Mr Balchin adds to the corpus of evidence led at the court, which included evidence of the details of some of the goods that were located. The description of these goods and photographs of them form part of the material. An affidavit filed on this appeal by Mr Regan of the Director of Public Prosecutions Office accepted, based upon the affidavit of Mr Meredith, that the unlawful possession charge related to some 58 items removed from Cox's vehicle. The evidence of Kitchen was that upon observing and locating these items in the vehicle, he immediately suspected they had been stolen. There were other matters relating to breath testing which are irrelevant to these proceedings When Kitchen located these goods, he asked Cox whether they belonged to him and he said, "no comment" in effect. He produced his driver's licence. Williams was also asked a question in relation to that property, saying, "Can you please explain to me who is the owner?" He said, "I have nothing to say on this point until I speak to my solicitor". Cox was then taken to the Portarlington police station with Williams and the property, and Cox was lodged in the cells while further **[4]** enquiries were made. Later, Cox became ill or had a fit and was taken to hospital and later, near 11 o'clock, was bailed. Both men were charged with the theft of the Scotch whisky; Exhibit GRK1 to Kitchen's affidavit. Cox pleaded guilty and was fined. They were also both separately each charged with an offence under s26 of the Act. The relevant section is in the following form:

> "26. Unexplained possession of personal property reasonably suspected to be stolen.
> (1) Any person having in his actual possession or conveying in any manner any personal property whatsoever reasonably suspected of being stolen or unlawfully obtained whether in or outside Victoria may be arrested either with or without warrant and brought before a bail justice or the Magistrates' Court or may be summoned to appear before the Magistrates' Court.
>
> (2) If such person does not in the opinion of the court give a satisfactory account as to how he came by such property, he shall be guilty of an offence.
> Penalty: Imprisonment for one year".

Subs(3) and subs(4) were not the subject of any submission before the Magistrate, nor did they form any part specifically of the orders made by Master Kings. Some low-key application was made by Mr Regan before me to seek to introduce some argument founded upon subs(3), but I rejected that attempt to argue a case not argued before the Magistrate, nor, as I would apprehend, raised before Master Kings when the question of law was formulated, nor, one may

also add, included in the outline of argument filed on behalf of the DPP before me. It has been long recognised by the courts that this section involves, if the criteria attracting its operation are established, some drastic interference with the rights of citizens. I refer to *McDonald v Webster* [1913] VicLawRp 114; [1913] VLR 506; 19 ALR 563; 35 ALT 101; 52 ALJR 404. The section is founded upon a suspicion formed in relation to goods in the actual possession of an individual who is, if the criteria are established, then obliged to give an explanation to a court in order to exculpate that person from the offence. It effectively reverses the burden of proof. The section has long formed part of the law of the Legislature in Victoria although it has undergone some amendment when the 1966 *Summary Offences Act* was enacted, including the addition of "reasonably" to the word "suspected" and the later subsections. This history of the Act was extensively considered and set out by McInerney J in *Pendlebury v Kakouris* [1971] VicRp 20 [1971] VR 177.

Before the Magistrate evidence was called as set out in the affidavits of Kitchen, Balchin and Mr Meredith. It was substantially as I have described it in these reasons. Submissions were then made to the learned Magistrate by way of a no-case submission by Mr Meredith, then acting for Williams; those submissions substantially being adopted by the representative of Cox. The prosecutor, Mr Balchin, replied to them, and, as it appears to me, both parties focused on much the same sphere of debate, namely, whether or not at the time of the formation by Mr Kitchen of the suspicion that the goods or property were reasonably suspected of being stolen or unlawfully obtained, the goods were in the possession of Cox or relative to the charges against Williams, Williams. This inevitably drew in for discussion by the lawyers and by the Magistrate various decisions made on s26 and its historical predecessors. Before the **[6]** Magistrate there was referred to the decision of the High Court of Australia in *Moors v Burke* [1919] HCA 32; (1919) 26 CLR 265; 25 ALR 213, and, in particular, the judgment of Isaacs J. In addition, there was some examination of the decision of the Full Court of this State in two related cases, *Rowe v Galvin; McKeown v Hill* [1984] VicRp 26; [1984] VR 350, treated as a single appeal.

The debate in this case really is whether or not Cox was in possession of the goods and property in his vehicle (he having admitted ownership of the vehicle, but having made no admission as to possession and ownership of the goods, nor had Williams) at the time that Kitchen formed his suspicion. As appears from the facts as I have described them to be, Cox had already been arrested on the charge of the theft of the whisky, handcuffed and was sitting in the police vehicle when Kitchen first saw the property. In a broad sense, the police officer who was prosecuting argued that, notwithstanding Cox's then situation, it should be concluded that he was in possession of the property which was in his vehicle and that his situation, that is his immediate situation, did not inhibit drawing the inference and conclusion that he was in actual possession of the goods, although he was not then physically in control of them. Some reliance was placed upon statements in the judgment of Starke J of this court in *Rowe v Galvin* (supra) to support that argument. Before me, Mr Regan, who appeared for the Director of Public Prosecutions, developed the argument further, relying upon some additional cases, what he called "container" cases, which in his submission supported the argument advanced that **[7]** possession could nevertheless still be held, although the possessor of the goods was not physically in control of them at the time of the formation of the suspicion, or, in some cases, not even near them nor having the goods in his presence.

Mr Meredith had argued in respect of both Cox and Williams that there was no relevant possession at the time because the property was still in the vehicle which was, as it were, under police control and search, and that neither Williams nor Cox could exercise a right of possession, namely, the right to take possession of the property. The Magistrate accepted the submission that there was no case to answer. He referred to *Rowe v Galvin*. In particular, reference had been made in argument to a statement by Starke, J in *Rowe v Galvin* which had some relationship to a motor vehicle to the effect, "No doubt if the money remained on the seat, he would still have been in possession of it, it being his motor car". I will return to what I call "the passage" relied on shortly.

When considering the submissions, the Magistrate focussed upon the situation of the defendants at the time Kitchen formed the suspicion that the property had been stolen or unlawfully obtained. No submission was made to him that the formation of the suspicion was other than reasonable. The informant had conceded in cross-examination that neither of the defendants were physically in the vehicle when the items were found and that that was a consequence of them having been placed under arrest. *A fortiori*, this applied to Cox who was handcuffed and in the police vehicle, Williams being, as **[8]** far as I can determine, outside both vehicles, and seated

on the ground. Kitchen said that he would not allow them entry into Cox's vehicle because they were under arrest.

In his reasons, the Magistrate said that the question whether the defendants could be said to have had exclusive, actual and immediate physical possession at the time of the formation of the suspicion by the informant was the critical question. The Magistrate concluded that it could not be said that the defendants were in a position where they did have physical and actual personal control of the goods, stating that the position may have been different had they not been arrested. He upheld the no-case submission. On 10th November 1995, Master Kings ordered that the following question of law be decided:

> That the learned Magistrate should have held that the property the subject of the charge was in the actual possession of the Respondent at the time when it was suspected of having been stolen; notwithstanding that at that time the said property was in his motor vehicle and he was under arrest and had been removed from the motor vehicle.

It becomes necessary to look at some cases cited to me in brief compass. The decision of the High Court in *Moors v Burke* is fundamental to a proper consideration of the legal matters in this case. Isaacs, J had considered statements from *Pollock and Wright on Possession*. He did this because it was necessary to construe the words contained in the Victorian Act, as it was then and now, that of "actual possession". That is arguably possession in fact rather than possession at law. The passages cited from *Pollock and Wright* involved a consideration of the elements involved, jurisprudentially speaking, in **[9]** possession, the authors identifying the use or "possession" in relation to movables as being used in three different senses. The first, to signify mere physical possession, that is, a state of facts; the second, the legal concept involving the capacity of the possessor to "assume, exercise or resume manual control of it at pleasure", and, finally, so far as regards other persons, that "the thing is under the protection of his personal presence in or on a house or land occupied by him or in some receptacle belonging to him and under his control".

If those elements exist, the person was in physical possession of the thing under Sir Frederick Pollock's designation. Isaacs, J in *Moors v Burke* at 274 stated:

> "'Having actual possession' means, in this enactment, simply having at the time, in actual fact and without the necessity of taking any further step, the complete present personal physical control of the property to the exclusion of others not acting in concert with the accused, and whether he has that control by having the property in his present manual custody, or by having it where he alone has the exclusive right or power to place his hands on it, and so have manual custody **when he wishes**". (my emphasis)

He went on to say:

> "But it does not include the case of a person who has put the property out of his present manual custody and deposited it in a place where any other person independently of him has an equal right and power of getting it, and so may prevent the first from ever getting manual custody in the future. In that event the property is not in his actual possession: it is where he may possibly reduce it again into actual possession, or, on the other hand, where the other person may himself reduce it into his own actual exclusive possession".

In that case, the relevant wool placed in the locker by Moors had ceased to be in his possession and he did not have it under his control, nor the exclusive right of **[10]** regaining it. The appeal in that case was therefore allowed. Mr Regan relied on statements in *Rowe v Galvin*. The details of *Rowe v Galvin* are too ample to here be reproduced conveniently. Hill was the driver of the vehicle in which Galvin was a passenger. Relevantly, they were both charged under s26 in relation to various goods. A sum of money wrapped in paper had been in the vehicle. Hill, the driver, had sat on it. He was the owner of the vehicle. Hill had been taken to the police station and took the parcel of money with her, that is, she had removed it from the vehicle. She had voluntarily given it to a police officer.

A number of issues were raised concerning the necessity of the timely co-existence of the actual possession of the goods by the accused with the formation of the suspicion. The Court held, applying *McPherson v Goldstone* (1920) VLR 331 and, for that matter, *Moors v Burke*, that the defendant had to be in physical possession at the time the relevant suspicion was formed. In relation to the charge against Hill, at the time the police officer formed the suspicion, the

money was not in the vehicle because it had passed into the custody of Galvin who had given it to the police. Starke, J also dealt with an aspect relating to whether or not possession was lost if the property were being actually examined in order to consider whether a suspicion might be formed in relation to them, referring to a decision of the Full Court of New South Wales, Street J in *Ex parte Miller* (1934) 51 WN (NSW) 23. It does not appear to me to be necessary to consider **[11]** this aspect in this case because the suspicion was instantaneously formed here by Kitchen. The present issue before me relates to whether or not possession could exist in Cox or Williams, notwithstanding their detachment, so to speak, under arrest from the vehicle in which the goods were when the suspicion was formed. Starke J's 'passage' already referred to by me was relied on by the DPP at all levels as saying and supporting the argument that, notwithstanding the fact that Cox and Williams were no longer in the vehicle, possession might still be had of the goods still in the vehicle owned by Cox. It does not appear to me to be necessary to determine whether or not the observation of Starke J made in relation to the facts in Galvin is correct or not. That might depend on the facts, not all of which were investigated. It may be assumed that, in appropriate circumstances, the disconnection between possessor of goods and the goods themselves will not prove to inhibit a finding of actual possession. As an example, if Cox had been standing unarrested outside the vehicle cleaning its windscreen when Kitchen formed the suspicion concerning the property, then it could hardly be said that he was not in possession of the car in which the goods were at the relevant time simply because he was standing outside it.

The key circumstance here appears to me to be an additional and different one, namely that at the time the suspicion was formed, Cox had been arrested, handcuffed and placed in the police vehicle. In those circumstances, it seems to me there is no basis on which it could be thought that if he had possessed the goods, he was capable of exercising the **[12]** power to resume control of the possession of the goods, either exclusively or non-exclusively, at his election, will or favour. On the contrary, it was strongly argued he had been dispossessed of them by the arrest, and also by him being placed in handcuffed custody. It could not in those circumstances be said that he had either legal or actual physical possession of the goods in his vehicle. This seems to me the basis upon which the Magistrate distinguished those authorities cited to him in relation to possession, notwithstanding it was not then direct and actual physical possession. If Kitchen had not arrested Cox and placed him in the police vehicle before discovering the bottle of Glenfiddich whisky, but had proceeded with the inspection of the goods, formed the same opinion and had then arrested Cox on both the theft charges and the s26 charges, the result might well have been a different result. However, that is not the fact, and, like the Magistrate, I am bound to proceed upon the basis of the findings of fact which were substantially uncontested.

Mr Regan, in a helpful argument, referred to some other authority, notably *Tatchell v Lovett* [1908] VicLawRp 91; [1908] VLR 645; 14 ALR 540; 30 ALT 88, which itself preceded *Moors v Burke*, *Donnelly v Devenish* [1926] VicLawRp 37; [1926] VLR 235; 32 ALR 208; 47 ALT 161 and *Olholm v Clink* [1923] VicLawRp 69; [1923] VLR 556; 28 ALR 421; 44 ALT 87. The latter was perhaps *prima facie* a powerful authority, as in that case the suspicion was formed in respect of goods which had previously been inspected at the accused's premises without that suspicion being formed. The suspicion was formed a day later in respect of goods seen the day before because of inconsistent statements made by an accused. However, the finding of **[13]** exclusive possession there could have been made because there had been no interference with the accused's possession in the elapsed time before the suspicion was formed. Moreover, it does not appear from the report that the circumstance here prevailing there prevailed, namely, that the accused was arrested and prevented from exercising possessory rights.

Mr Lavery in his submissions on behalf of the respondent confined them to two aspects. The first was to distinguish any application of *Rowe v Galvin* on the basis that the facts in it were quite different, in that specifically there was found to be no forcible termination of possession. If leaving the money in his vehicle could have amounted to possession, it mattered not because Galvin had removed the goods and voluntarily given them to the police. He pointed to the caveat, so to speak, maintained by Starke J that the position might well have been different if possession had been forcibly terminated. Accordingly, he submitted that the arrest and detention of Mr Cox made the case completely distinguishable. Whether it is necessary to distinguish *Rowe v Galvin* may be doubted as it does not necessarily deal with the point that has to be here dealt with, namely, the intervention of an arrest and detention as affecting the capacity of a court rightly to conclude there was actual possession within the meaning of the section.

A second aspect raised by counsel for the respondent of some significance was not raised before the Magistrate. It is the position, of course, that the Magistrate's decision can be upheld on any ground open on **[14]** the facts and the law even if the Magistrate had not addressed it, as he did not address the second of these submissions. The second submission was that no consideration was given to which of Williams or Cox had actual possession of the goods. They had been separately charged. It was not run as a case of possession in concert; and indeed Mr Regan very fairly disclaimed here that whatever might have been done before the Magistrate, he was not running a case of concert. Because the evidence did not, as it were, disentangle which of the two had actual possession, there being no concert possession, it was open to be argued that the Crown had not discharged the burden and fulfilled the necessary criteria on that ground alone. Cox had not admitted anything more than ownership of the vehicle. He had not admitted ownership nor possession of the goods; neither had Williams. The case of possession against Cox arose solely from his ownership of the vehicle and his control of it.

Accordingly, the submission was here raised that it was just as consistent to say that, notwithstanding that Cox owned the vehicle, the goods in it were in Williams' possession or conceivably even in his ownership. It seems to me that this is a persuasive submission, but it is not absolutely necessary for me to make any decision about it because I conclude that the submissions made to the Magistrate and the Magistrate's decision are correct.

Accordingly, I am of the view that the appeal must fail. The question formulated by Master Kings on 10 November 1995, being that the learned Magistrate should **[15]** have held that the property the subject of the charge was in the actual possession of the respondent at the time when it was suspected of being stolen, notwithstanding that at that time the said property was in his motor vehicle and he was under arrest and being removed from the motor vehicle, is answered in the negative.

I decide the question of law in the way I have described, namely, that the Magistrate was correct in holding that the property was not in the actual possession of the respondent at the time when it was suspected of being stolen because he, Cox, being under arrest and being forcibly detained in the police vehicle was not in actual possession of the property.

ORDER: Accordingly, I am of the view that the appeal must fail.

APPEARANCES: For the Appellant: Mr M Regan, counsel. Solicitors for the Appellant: Victorian Government Solicitor. For the Respondent: Mr J Lavery, counsel. Solicitors for the Respondent: Peter Lynch.
