

23/92

## SUPREME COURT OF VICTORIA

**THOMPSON v COLOE**

Nathan J

4, 20 March 1992

**DISPUTED PROPERTY IN POSSESSION OF POLICE – CLAIM BY PERSON IN POSSESSION FOR DELIVERY – CLAIM ALSO MADE BY POLICE OFFICER – APPLICATION MADE FOR FORFEITURE OF PROPERTY AND DISPOSAL – WHETHER COURT HAS JURISDICTION TO ORDER FORFEITURE: POLICE REGULATION ACT 1958, S125.**

1. Section 125 of the *Police Regulation Act 1958* ('Act') applies to property in possession of the police where doubts are raised between two or more persons as to who is entitled to possession of the property. It requires a court to resolve these doubts and make an order that the police officer deliver the property to one of the competing claimants. There is no power enabling a police informant to become a claimant and seek forfeiture of the property and an order for its disposal.

2. Accordingly, where property remained in custody of police following an unsuccessful charge of unlawful possession, and an application was made to a magistrate pursuant to s125 of the Act, the magistrate was in error in ordering that the property be forfeited to the Crown and to be disposed of at the discretion of the Police Minister.

**NATHAN J: [1]** A magistrate ordered a Ford utility vehicle, which the applicant (Thompson) asserted he owned, be forfeited to the Crown and disposed of at the discretion of the Police Minister. The order followed an application made by the respondent, Senior Detective Coloe (Coloe). That application was made under the provisions of s125 of the *Police Regulation Act 1958* No. 6338 (the Act). This Order to Review challenges the magistrate's jurisdiction and discretion to have made the forfeiture and disposal order.

The following brief history puts the Application into context. Thompson was charged in March 1989 pursuant to the *Summary Offences Act* s26(1) with being in possession of the vehicle which was suspected of being stolen. The charge was dismissed. Coloe asserted the dismissal was on technical grounds and held to his belief that the vehicle was stolen.

In March 1990 the Application was issued under the hand of Coloe as Applicant. It listed, as claimants of the vehicle, Thompson and the Victoria Police. The enabling provisions of the Act, as appropriately edited, reads:

When any member of the police force has taken possession of any goods ... and it is doubtful whether any person claiming such goods or which of any two or more persons so claiming is entitled to the possession thereof, upon the application of such member and in the presence of all the parties claiming such goods (a magistrate) may hear receive and examine evidence touching the matter of such application and may order to whom such goods shall be delivered by such member, and such goods shall be delivered accordingly; ... but such order or delivery shall not affect the rights or liabilities of the persons claiming such goods or to whom the same have been delivered as aforesaid".

**[2]** The section has two parts, first what a member should do when doubts are raised between two or more persons claiming to be entitled to possession of goods in custody, and secondly, how the magistrate might resolve those doubts, but being limited to ordering the police member to delivering the goods to one of the competing parties. Neither part of this bifurcated section was complied with in this case.

The provision stems from an earlier colonial Act, but has not received much judicial consideration, but see *Coghill v Warrell* [1890] VicLawRp 51; (1890) 16 VLR 238, *Field v Sullivan* [1923] VicLawRp 12; [1923] VLR 70; 29 ALR 38; 44 ALT 117 and *O'Keefe v Bunton* [1953] VicLawRp 17; [1953] VLR 94; [1953] ALR 158, and none at all where a police member has asserted a claim

on behalf of the Victoria Police. This case was, in effect a claim for escheatment to the Crown where the police member contended a rightful owner could not be found, despite the failure to have convicted the purported owner of unlawful possession.

Under cross-examination at the hearing, Coloe conceded:

- "(a) that he had no proof that the car was ever stolen or illegally obtained;
- (b) that he had no forensic qualifications to comment as an expert on the erasure of engine numbers;
- (d) that he had been unable to ascertain who owned the vehicle;
- (e) that it belonged to a Mr RA McCarthy;
- (f) that he had not been able to trace where this RA McCarthy resided;
- (g) that neither the owner nor anyone else had ever reported the vehicle stolen;
- (h) that no-one else other than Mr Thompson had ever sought to claim the vehicle."

[3] Coloe's application was wholly misconceived, and the magistrate's forfeiture and disposal order pronounced without any jurisdictional basis. The reasons are as follows. The Act in its express terms regulates the powers and behaviour of police members. But neither expressly or implied is there power for a police member to escheat for the Crown or confiscate a citizen's property, and have the Police Minister dispose of it. If there were to be such power or authority it would have had to be stated in clear, unambiguous terms. Provisions which provide for forfeiture must be read strictly. They should be equated with penal provisions, any ambiguity ought to be resolved in favour of the owner. *Collector of Customs (NSW) v Traders Finance Corp Ltd* [1971] HCA 60; (1971) 126 CLR 429; [1972] ALR 653; (1971) 45 ALJR 668, Menzies J at 657 and Gibbs J at 663, *Cheatley v R* [1972] HCA 63; (1972) 127 CLR 291; [1972-73] ALR 907; 47 ALJR 57, *Farmer v Murphy* (1985) 67 ALR 114. The presumption that the law protects existing proprietary rights and common law rights is based on the philosophy that it is the responsibility of the courts to protect the individual from the excesses of the State. It is assumed that this protection is best afforded by the principles of the common law. While legislation can override the common law, the courts require that it be clearly shown that the legislature intended to do so.

In the High Court case of *Potter v Minahan* [1908] HCA 63; (1908) 7 CLR 277; 14 ALR 635 at 304, O'Connor J said:

"It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law without expressing its intention with irresistible clearness; and give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, [4] would be to give them a meaning in which they were not really used".

In *Sargood Bros v Commonwealth* [1910] HCA 45; (1910) 11 CLR 258 at 279; 16 ALR 483 O'Connor J of the High Court said:

"It is a well recognized rule in the interpretation of Statutes that an Act will never be construed as taking away an existing right unless its language is reasonably capable of no other construction".

More recently in *Pyneboard Pty Ltd v Trade Practices Commission* [1983] HCA 9; (1982) 152 CLR 328; 45 ALR 609 at 617; (1983) 57 ALJR 236; [1983] ATPR 40-341; 5 TPR 75, Mason ACJ, Wilson and Dawson JJ referred to 'the general principle that a statute will not be construed to take away a common law right unless the legislative right to do so clearly emerges, whether by express words or by necessary implication'. Finally, another useful expression of the principle appears in *Melbourne Corporation v Barry* [1922] HCA 56; (1923) 31 CLR 174 per Higgins J at 206:

"It must be borne in mind that there is this common law right ... and that any interference with a common law right cannot be justified except by statute – by express words or necessary implication. If a statute is capable of being interpreted without supposing that it interferes with the common law right, it should be so interpreted".

Not a vestige of the power to forfeit and dispose in usurpation of the common law can be seen or distilled from s125. Its terms pronounce its ambit and purpose, namely where goods, in the possession of a police member, are subject to competing claims between non-members or citizens, the member may resolve doubts about entitlement by referring the claims to a magistrate. The magistrate then becomes seized of the competing claims and orders to whom the goods may be delivered.

There is no place for the police member to become a claimant on behalf of the Victoria Police, as Coloe did in this case. There is no power in the magistrate to escheat the goods to the Minister. The magistrate's power is limited to assigning "delivery of the goods" to one or other of the competing [5] claimants. Further, the section directs the magistrate to order the member to deliver such goods. There is no mention of delivery of such goods to a police member or to the Minister for disposal.

The section is predicated upon "doubts" between persons claiming ownership or at least a right to possession of goods in police custody. Here there was no contest. Coloe did not claim any personal interest. No other person, despite police endeavour to find one, had come forward to claim any interest in the goods, and it had been judicially determined that Thompson was not, when he first had the goods, unlawfully in possession of them. Retention of the vehicle by the police in these circumstances was simply outrageous, even acknowledging the member's genuine belief that the utility was stolen. The application can be characterized similarly. All orders made pursuant to it are quashed.

**APPEARANCES:** For the appellant Thompson: Mr P Chadwick, counsel. Markopoulos Brown, solicitors. For the respondent Coloe: Mr BM Dennis, counsel. Victorian Government Solicitor.

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