39/79

SUPREME COURT OF VICTORIA

KELTON v BRUCE

McInerney J

14 December 1978

CRIMINAL LAW – UNLAWFUL POSSESSION OF A CAR-JACK FOUND IN DEFENDANT'S GARAGE AT HIS HOME – HOUSE AND LAND ON WHICH GARAGE STOOD WAS OWNED BY DEFENDANT AND HIS WIFE IN JOINT NAMES – DEFENDANT AND HIS WIFE WERE THE ONLY PERSONS WHO HAD THE USE OF AND ACCESS TO THE GARAGE – MEANING OF "UNLAWFUL POSSESSION" – WHETHER DEFENDANT HAD ACTUAL POSSESSION OF THE CAR-JACK – WHETHER DEFENDANT WAS IN EXCLUSIVE POSSESSION OF THE CAR-JACK – FINDING BY MAGISTRATE THAT DEFENDANT GUILTY OF THE CHARGE OF UNLAWFUL POSSESSION – WHETHER MAGISTRATE IN ERROR – APPEAL TO COUNTY COURT – APPEAL ALLOWED – CONVICTION AND SENTENCE QUASHED – WHETHER COUNTY COURT JUDGE IN ERROR: *SUMMARY OFFENCES ACT* 1966, S26(1).

HELD: Appeal allowed. Conviction and sentence quashed.
1. On a charge laid under Section 26(1) the question is whether at the relevant time the defendant had the relevant property in his actual possession or was conveying that property. The question is not one of ownership but of possession. Claims to ownership are therefore relevant so far as they assist in determining the question whether the defendant is shown to have been in actual possession of the property or to have been conveying it. The phrase "actual possession" may readily be taken to have been used to differentiate the case from that of constructive possession.

2. Whilst the defendant may be regarded as having admitted that the jack was in his possession and as having admitted that he had bought and paid for it, nevertheless he cannot be regarded as having at any stage unequivocally admitted or asserted that he was at the relevant time the owner of the jack or, perhaps more accurately, the sole owner of the jack. In the second conversation with the police informant when questioned as to whether he was denying ownership of the jack the appellant said, "No". That answer (if true) is consistent with his being at the time one of the co-owners of the jack. Ordinarily an inference of the right to possession would flow from a claim of title although this is not necessarily always so.

3. It is to be remembered that it is physically possible for one joint tenant to take exclusive possession of the joint property to the exclusion of the other tenant therefrom. The joint tenant so seizing the property had, immediately prior to the seizure of the property the same right or power of taking the property as had the dispossessed co-owner. In this case there was nothing to show that the defendant's wife did not have an equal right or power of getting the car-jack at any time and so preventing the defendant from ever getting manual custody in the future. In those circumstances, nothing more being proved, it was not open to the learned trial Judge on appeal to have found that the appellant was in actual possession of the property at the relevant time.

McINERNEY J: This is a case stated by His Honour Judge Wright pursuant to s85(1) of the *Magistrates' Court Act* 1971 (Act No. 8184). His Honour had before him an appeal by the defendant David Joseph Bruce from conviction at the Magistrates' Court at Box Hill on 6 September 1976. He was charged with having at Doncaster on 23 April 1976 in his actual possession personal property, to wit, a mobile car-jack reasonably suspected of having been stolen or unlawfully obtained. On that information he was convicted and sentenced to be imprisoned for fourteen days.

The appellant Bruce appealed to the County Court against conviction and sentence. Those appeals were heard by His Honour Judge Wright on 24 January 1977. The appeal against conviction was allowed and His Honour quashed the conviction and sentence. According to the affidavit of William Leslie Horigan, His Honour immediately afterwards acceded to an application by Counsel for the informant to state the facts specially for the determination of the Supreme Court.

In the case stated His Honour states, that he found the following facts:

(i) That at about 12.30 pm on Friday 23 April 1976, the respondent/informant went with another policeman to the appellant's house at 10 Dianne Street, East Doncaster and was shown by the appellant into a garage at the rear of the house.

(ii) That in the garage the respondent/informant pointed to a mobile car-jack amongst other property on the floor and that when he first saw the jack the respondent suspected that it was stolen or unlawfully obtained. The case states that this suspension as to the property was reasonable. I take the word 'suspension' to be a typographical mistake for the word 'suspicion' and I take His Honour to have meant that at the time when the informant first saw the property he suspected, on reasonable grounds, that the property was stolen or unlawfully obtained. See s26(1) *Summary Offences Act* 1966 (Act No. 7405).

The special case further states (iii) that in the garage the appellant was questioned by the respondent and that the following conversation took place:—

Q. Is this your jack?
A. No, it's stolen why don't you take the whole garage away.
Q. How did it come into your possession?
A. I don't know.
Q. Did you buy it?
A. I got it about 6 years ago.
Q. Who did you buy it from?
A. I can't remember.
Q. Where did you buy it?
A. I can't remember.
Q. Did you buy it from a business house?
A. I got it through the Trading Post.
Q. What address did you go to when you collected it?
A. Middle Park somewhere.
Q. How much did you pay for it?
A. Ninety quid.

The case stated further sets out (iv) that on Friday 23 April 1976 at the Doncaster Police Station the appellant was again questioned by the informant and that the following conversation took place:

Q. Is the garage yours?
A. Yes.
Q. Who has the use of the garage?
A. I do.
Q. Does anybody else use it or have access to it?
A. Only the wife.
Q. Is the garage usually kept locked when you are absent from your house?
A. Yes.
Q. Do you say that the car-jack is yours?
A. No comment.
Q. When you say no comment to the last question are you denying ownership of the jack?
A. No.
Q. Does some other person own the jack?
A. No comment.
Q. How did the jack get into your garage?
A. Bought from the Trading Post.
Q. When was it bought through the Trading Post?
A. Three years ago.
Q. Did you buy it?
A. Yes.

The case stated contains no statement as to whether His Honour found that any of the answers given by the appellant/defendant in the conversations referred to in sub paragraphs (iii) and (iv) were true.

The case further states the following further findings of fact;
(v) the appellant (Bruce) and his wife were the only persons who had the use of and access to the garage, and that it was usually kept locked when they were absent from the house.

(vi) that the house and land on which the garage stood was owned by the appellant and his wife in joint names.

The case stated recites that at the close of the case for the respondent/informant His Honour held on the above facts that at the relevant time the appellant/defendant was not in actual possession of the jack as the house was owned in the joint names with his wife and she had an equal right of access to the garage and the jack. Accordingly His Honour did not call on the appellant/defendant to give a satisfactory account as to how he came by the property – see Section 26(2) of the *Summary Offences Act* – and His Honour allowed the appeal against conviction.

In ruling at the close of the respondent's case that the appellant was not in actual possession of the jack, His Honour was in reality ruling that on the evidence as it stood the appellant could not lawfully be convicted.

> "When, at the close of the case for the prosecution, a submission is made that there is 'No case to answer', the question to be decided is not whether on the evidence as it stands that the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is really a question of law." *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654 at p658; [1955] ALR 671.

Accordingly what this Court must determine is whether on the facts found, His Honour rightly quashed the conviction on the ground that on the evidence adduced by the informant, the appellant could not be held to have been in actual possession of the jack at 12.30pm on Friday 23rd April 1976, when the informant pointed out the mobile power jack to the appellant on the floor of the garage at the appellant's home.

On a charge laid under Section 26(1) the question is whether at the relevant time the defendant had the relevant property in his actual possession or was conveying that property. The question is not one of ownership but of possession. Claims to ownership are therefore relevant so far as they assist in determining the question whether the defendant is shown to have been in actual possession of the property or to have been conveying it. The phrase "actual possession" may readily be taken to have been used to differentiate the case from that of constructive possession. The history of the legislation was reviewed by the High Court in *Moors v Burke* [1919] HCA 32; (1919) 26 CLR 265 at pp272-4; 25 ALR 213 at pp216-7. Its subsequent history is set out in *Pendlebury v Kakouris* [1971] VicRp 20; (1971) VR 177 at pp180-181. I need not set out those passages *in extenso* in these reasons for judgment. I repeat for the purposes of this case what I said in *Pendlebury v Kakouris* (*supra*) at p181.

> "The offence created by Section 26 of the *Summary Offences Act* 1966 may be described as that of failing to give to the Court of Petty Sessions a satisfactory account as to how the accused came by personal property which he had in his actual possession or was conveying in any manner at the time when the informant reasonably suspected it of having been stolen or unlawfully obtained. In the present case the defendant was not at any material time conveying the property the subject matter of the information. Consequently the prosecution had to prove that the property the subject of the information was in her actual possession. Where, as here, the property was found in the building, the decisions on the question whether the property was or was not in the actual possession of the defendant are by no means easy to reconcile."

Because of the difficulties of reconciling the various decisions to which I referred in *Pendlebury v Kakouris supra*, I would have welcomed an opportunity to refer this case stated to the Full Court for determination. Mr Parkinson of Counsel for the informant indicated however that he did not ask me to refer the matter to the Full Court. I have power to refer the matter to the Full Court only on the request of one or both of the parties – see s85(2) of the *Magistrates' Court Act* 1971.

The judgment in *Moors v Burke* (*supra*) – which has always been accepted as authoritative, and which, as I see it, was not in any way called in question in the judgments in *Williams v Douglas* [1949] HCA 40; (1949) 78 CLR 521; [1950] ALR 223 (CLR at pp573-4; ALR at p217) – emphasised the proposition that the "'possession'" which is to bring about criminal consequences entailing possibly twelve months' imprisonment is to be no mere legal conception, based on real property distinction, but a plain fact personal to the accused". Their Honours proceed (at p274):

> "The very circumstance that the mere 'opinion' of the Justices of the defendant's explanation is not

> satisfactory coupled with legislative care to secure actuality of possession as a condition precedent indicates to us that the Justices were not limited by any rigid technical connotation of actual possession but had to consider whether in the particular instance, in the circumstances, the man was in such physical control of the property as in ordinary life would, if unexplained, indicate that he was its possessor."

Their Honours then proceed with words which have frequently been cited although it must be borne in mind that the words used are not words of the statute but merely a judicial interpretation of the statute, and therefore not to be used in substitution for the words of the statute:

> "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 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.
>
> In its nature it corresponds to its companion expression 'conveying', which necessarily involves instant personal physical control to the exclusion of others. Those two expressions are obviously intended to cover the whole ground of actual personal control – that is, whether the property is kept stationary or is in motion. But it does not include the case of the 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 *Pendlebury v Kakouris* (*supra*) at p181 I referred to the omission from the *Summary Offences Act* 1966 of the words "whether in a building or otherwise" (which in the opinion of the High Court in *Moors v Burke* (*supra*) at p272) had been inserted in order to meet and overcome the difficulties created by English and New South Wales decisions such as *Hadley v Perks* (1866) 1 QB 444, *In re Frith* 17 NSWLR (L) 421 and *Ex parte Lisson* (1902) 2 SR (NSW) 373; 19 WN (NSW) 263). I suggested that the omission of those words might give rise to problems in the future. It was unnecessary for me in that case to attempt to resolve those problems. It is to be observed, however, that even assuming that the appellant may, in the first conversation (recorded in sub paragraph (iii) of the case stated), be regarded as having admitted that the jack was in his possession and as having admitted that he had bought and paid for it, nevertheless he cannot be regarded as having at any stage unequivocally admitted or asserted that he was at the relevant time the owner of the jack or, perhaps more accurately, the sole owner of the jack. In the second conversation (recorded in sub-paragraph (iv) above, when questioned as to whether he was denying ownership of the jack the appellant said, "No". That answer (if true) is consistent with his being at the time one of the co-owners of the jack. Ordinarily an inference of the right to possession would flow from a claim of title although this is not necessarily always so – see *McKnight v Wooding* [1935] VicLawRp 6; (1935) VLR 30; [1935] ALR 66; *Wilby v Gilder* [1942] VicLawRp 8; (1942) VLR 28; (1942) ALR 13.

There is perhaps an implied admission of possession in the answer to the second question in the first conversation:

> "Q. How did it come into your possession"
> A. I don't know."

This answer is however consistent with the jack being in his joint possession by virtue of his being the joint owner of the house and land on which the garage stood, and is not necessarily evidence of his having at that time been in exclusive possession thereof.

Mr Parkinson invited me to hold that each of two joint tenants could be charged with unlawful possession under the section and that the present was such a case. From the words in *Moors v Burke* "to the exclusion of others not acting in concert with the accused" Mr Parkinson argued that one joint tenant must necessarily be regarded as acting in concert with the other. I do not accept this submission – which smacks of real property doctrines – as a necessary concomitant of the proposition that joint tenants are jointly entitled to possession of each and every part of the property jointly owned. It is to be remembered that it is physically possible for one joint tenant to

take exclusive possession of the joint property to the exclusion of the other tenant therefrom. The joint tenant so seizing the property had, immediately prior to the seizure of the property the same right or power of taking the property as had the dispossessed co-owner. Here there is nothing to show that the tenant's wife did not have an equal right or power of getting the jack at any time and so preventing the defendant/appellant from ever getting manual custody in the future. In those circumstances, nothing more being proved, I do not think it was open to the learned trial Judge to have found that the appellant was in actual possession of the property at the relevant time.

APPEARANCES: For the informant Kelton: Mr Parkinson, counsel. EL Lane, Crown Solicitor, State of Victoria. No appearance for the defendant Bruce.
