**31/74**

## SUPREME COURT OF VICTORIA — FULL COURT

# *R v VAN SWOL*

**Gowans, Nelson and Anderson JJ**

**14-16, 20, 24 May 1974**

**[1975] VicRp 5; [1975] VR 61; (1974) 4 ALR 386; (1974) 27 FLR 353**

**CUSTOMS – OFFENDER CHARGED WITH HAVING IN HIS POSSESSION A PROHIBITED IMPORT NAMELY OPIUM – OFFENDER OBSERVED BY NARCOTIC AGENTS PLACING A SHOPPING BAG IN A MOTOR CAR – BAG LATER FOUND IN OFFENDER'S DWELLING CONTAINING OPIUM – DENIAL BY OFFENDER HE WAS IN POSSESSION OF THE PROHIBITED IMPORT – MEANING OF "HAS IN HIS POSSESSION" – WHETHER OFFENDER IN "POSSESSION" – WHETHER FINDING OF OPIUM AND SUSPICION MUST CO-EXIST – OFFENDER FOUND GUILTY – WHETHER ERROR DISCLOSED: *CUSTOMS ACT* 1901-1971 (CTH), S233B(1)(ca).**

**HELD: Application for leave to appeal dismissed.**

**1. In the instant case it was open to the jury to find on the evidence of the agents at North Wharf Road that the article the applicant had had in his possession at North Wharf Road was the shopping bag found a few hours later at Carlton, and that what was in the shopping bag at North Wharf Road was something that merely filled the bottom of the bag. It was open to them to find that the applicant had conveyed the bag to the house at Carlton, that his girlfriend room-mate had no knowledge of it, and that he had placed it under the clothes in the tea chest belonging to her, where he would know where it was and be able to recover it at will, and where she would, although having the right to resort to the tea chest, be unlikely, having regard to the fact that she had left the tea chest unpacked and uninspected for two months, to discover it except by accident, or, if she did discover it, to take it away. It was then open to them to draw the inference from his hiding the bag in this way and from his false denial, when it was discovered and before the contents had been shown to him, that he had even seen the bag before, and from the fact that when discovered it actually contained opium, that he had the guilty knowledge when it was discovered that it in fact contained opium and that it had contained opium when he had hidden it away.**

**2. On this basis there was evidence upon which the jury could find that the applicant, at the time of the search at the Carlton house, had the opium in his possession, within the proper meaning of that term in the statutory provision. The trial Judge therefore rightly rejected the submission to the contrary made at the end of the Crown case.**

**3. In relation to the submission made that there was no case to answer because there was no evidence that the suspicion that the opium had been imported was entertained at a time when it was in the possession of the offender, in the case where the initial conception is possession of any personal property whatsoever it is an easy step to conclude that it was intended that there should be some element of criminality or culpability about the possession itself and that therefore the suspicion of the property being stolen should be a coincident of the possession. But where the initial conception is possession of narcotic goods prohibited as imports the conclusion that the intention was that the suspicion should be a coincident of the possession in order to import criminality or culpability is not so obvious, and the justification for deferring the time for forming a suspicion is more apparent.**

**4. In the context of para. (ca) there is to be found no good reason (apart from some possible harsh operation in particular situations resulting from suspicion arising after long delay) for attributing to the legislature the intention of insisting on the suspicion of illegal importation being formed at the same time as the possession of the narcotic goods is found to exist. The language does not reflect any such intention. On the other hand there are strong reasons for attributing to the legislature an intention to leave room for the practical consideration of not tying the formation of a suspicion to possession, but letting it depend upon the checking of the identity of substances found and of compliance with conditions of importation after possession had ceased. In its essence s233B is a piece of legislation directed at the suppression or control of narcotic drugs. The section deals with substances the possession of which can easily be abandoned and the identification of which may involve examination or even analysis and in respect of which the circumstances of importation may**

**call for inquiry. None of this can adequately be provided for if the construction is adopted that the suspicion of illicit importation must exist before possession is abandoned or lost. Even in the case where the substance is readily identifiable and the circumstances permitting importation of such substances is known the coincidence of suspicion with possession could readily be destroyed by the party in possession throwing it away or otherwise abandoning it before it is possible to make an examination. Having regard to these considerations a construction which favours a practical operation of the provision and which the language permits to be adopted ought to be preferred.**

**GOWANS J:** [delivered the judgment of the Full Court (Gowans, Nelson and Anderson JJ)]: The appellant, Fernand George Van Swol, was presented before his Honour Judge Coleman in the County Court at Melbourne on 19 February 1974 on a charge alleging an offence against s233B(1)(ca) of the *Customs Act* 1901-1971 (Com.). The particulars of the charge were that on 9 March 1973 at Carlton he, without reasonable excuse, had in his possession a prohibited import to which that section applied, to wit opium, which was reasonably suspected of having been imported into Australia in contravention of the *Customs Act*. He pleaded not guilty and after a trial lasting three days the jury returned a verdict of guilty. He has now applied for leave to appeal against the conviction.

The facts disclosed by the evidence were that about 9:30 a.m. on 9 March 1973 the applicant, a waterside worker by occupation, was seen by two narcotic agents of the Department of Customs and Excise to be standing on North Wharf Road, an extension of Flinders Street West, outside a quarantine station. According to the agents, a motor car of a particular description and registered number was seen to drive along and pull up near him, and he was seen to take a bag from under his jacket and left arm, holding it in his right hand by its handle. It was not a parcel as the applicant later contended. The bag was seen to be a white plastic shopping bag bearing a black motif and obviously containing something in the bottom of it. The applicant put the bag behind the passenger seat and got in and was driven away. The bag was said by the observers to be similar to one found at a house later that day and then seen to contain two blocks of prepared opium. A few hours after the North Wharf Road incident other narcotic agents visited the house in Carlton where the applicant lived. It was a two-storey terrace house with two bedrooms and a kitchen downstairs, a bathroom on the landing of the stairs, and a bedroom, a lounge and a balcony upstairs. The two bedrooms downstairs were occupied by a university student named Allen and the owner, a woman named Mrs McCormack, and the upstairs bedroom, lounge and balcony were occupied by the applicant and the girl Diana Winter with whom he lived. The kitchen and bathroom were used in common by all in the house. Sometimes those below visited the lounge upstairs. It contained furniture belonging to Miss Winter and the balcony contained some unpacked belongings of hers in tea chest containers. She had occupied the upstairs part for about two months before 9 March, and some weeks after her coming there the applicant had moved in with her.

On arrival, the agents saw outside the house the car which had earlier been seen at North Wharf Road, and inside the house, in the downstairs passage, they saw the applicant. They made a search of the parts downstairs and the car and proceeded to search the bedroom upstairs and the lounge and balcony. The applicant expressed some resistance to the search of the lounge. One of the agents, Vaughan, carried the search to the balcony and turned his attention to a tea chest containing some materials. On the top was a quilt and underneath some women's clothing, and into this he burrowed and found at the bottom a white plastic shopping bag of the same description as that seen earlier in the possession of the applicant in North Wharf Road. He beckoned over another agent named Hill. They lifted the bag out of the tea chest and looked inside it and saw two blocks of a black or brown substance which Hill suspected of being prepared opium, with which he was familiar. He also suspected it of being imported into Australia. As it turned out it was in fact opium prepared for smoking and it weighed 917.6 grammes. He took the bag and its contents from Vaughan and walked over to the applicant in the lounge. Asked if the bag was his the applicant said that he had never seen it before. The bag was opened but the applicant said he had seen nothing in it. He told the agents that he had never handled the bag or its contents before nor was he holding it for anyone else. He was then arrested.

Allen and Miss Winter in turn disclaimed any knowledge or possession by them of the shopping bag or its contents, but the latter (who gave evidence for the defence) claimed the tea chest and the materials in it as belongings of hers which she had left unpacked and uninspected for some two months before 9 March.

The applicant, in evidence, admitted his presence in North Wharf Road but denied having had possession of the shopping bag, claiming that the parcel he carried was a Balinese mask wrapped in white paper which he had just collected from the quarantine office on behalf of Miss Winter. He disclaimed any knowledge of the shopping bag and its contents at any time before they were produced to him by the agents at the house.

At the end of the Crown case the learned Judge rejected a submission that there was no case to answer on the basis that there was no evidence from which possession of the opium by the applicant could be inferred, and that in any case there was no evidence that the relevant suspicion was entertained while the goods were in the possession of the applicant. The Judge ruled that it was not necessary for the purpose of the provision in question that the possession and the suspicion should coincide.

Before going to the grounds of appeal and the submissions put in their support it is necessary to consider the terms of the statutory provision under which the charge is laid.

Section 233B is, by the terms of subs(2) thereof, expressed to apply to "prohibited imports which are narcotic goods". By subs(3) an offence against it is punishable as provided by s235, and by that section if the narcotic goods consist of a narcotic substance of at least a particular quantity, it is to attract a higher penalty unless (pursuant to subs(4)) the Court is satisfied that the offence was not committed for a purpose related to the sale of or other commercial dealing in the narcotic goods. By s4 of the Act "narcotic goods" means goods that consist of a narcotic substance, and "narcotic substance" means a substance or thing the name of which is specified in column 1 of Schedule V1 to the Act or any other substance or thing for the time being declared by the regulations to be a narcotic substance. Schedule V1 to the Act contains in column 1 the item "opium". The reference to "prohibited imports" in s233B is explained by s51 to be goods the importation of which is prohibited by s50, and the latter section empowers the Governor-General to prohibit the importation of goods into Australia by regulation. The *Customs (Prohibited Imports) Regulations* prohibit the importation of some goods absolutely (including "opium prepared for smoking") and of others without a permit and of others except under conditions and they prohibit the importation of certain drugs except under conditions.

The relevant provisions of s233B are as follows:—

> "233B(1) Any person who— ...
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> (c) without reasonable excuse (proof whereof shall lie upon him) has in his possession any prohibited imports to which this section applies which have been imported into Australia in contravention of this Act, or
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> (ca) without reasonable excuse (proof whereof shall lie upon him) has in his possession any prohibited imports to which this section applies which are reasonably suspected of having been imported into Australia in contravention of this Act—
>
> shall be guilty of an offence.
>
> "(1B) On the prosecution of a person for an offence against subs (1) of this section, being an offence to which paragraph (ca) of that sub-section applies, it is a defence if the person proves that the goods were not imported into Australia or were not imported into Australia in contravention of this Act."

The first grounds of appeal falling for consideration are those numbered 6, 1 and 4 in the notice, which are as follows:—

> "6. The judge was wrong in not upholding submissions made by my barrister at the end of the Crown case."
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> "1. Judge was wrong in his definition of possession."
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> "4. The judge failed to put my defence properly."

In support of these grounds it was submitted that there was no evidence that on the date and at the place alleged the applicant had in his possession the opium to which the charge relates.

This submission raises the question as to what is meant by the words "has in his possession" which appear in para.(ca) of s233B(1). The term is left undefined in the Act.

It was put for the applicant that the word possession meant "actual possession" as opposed to "constructive possession" and that "actual possession" meant either personal physical possession of the thing, or the exclusive power to reduce it into personal physical possession, and, in the case of something in a container, knowledge at least that there was something in it.

The Court was pressed by the authority of decisions under s26 of the *Summary Offences Act* 1966 of the State of Victoria, and its predecessors. But decisions on different statutory provisions enacted by a different legislature at a different time and with an entirely different subject-matter history and setting can be of little direct assistance in the construction of the provision under consideration. The word "possession" even in the criminal law is capable of a very extended meaning, as for example in regard to larceny. Its particular meaning in a context must depend upon the context: see the observations of Lord Wilberforce in *R v Warner* [1969] 2 AC 256 at pp309-10; [1968] 2 All ER 356; (1968) 52 Cr App R 373; [1968] 2 WLR 1303.

It is understandable that the "possession" which under a statutory provision exposes the person concerned to arrest or to onerous obligations in the way of furnishing an explanation as to its origin, on pain of punishment, would be likely to be accorded a restricted meaning, and, if the context permitted it, be given some interpretation indicative of physical association or at all events exclusive of constructive possession. That was done by Hood J in *Tatchell v Lovett* [1908] VicLawRp 91; [1908] VLR 645; 14 ALR 540, and in the cases which he followed in that decision. It was also the approach which influenced the judgments in *Williams v Douglas* [1949] HCA 40; (1949) 78 CLR 521; [1950] ALR 223. There was much more favouring the approach in the Victorian legislation in question in the former case than in the West Australian legislation involved in the latter case. However, in the latter case, influenced by the obligation imposed by the statute on a person in possession or control of gold to account for his connexion with it, Latham CJ, Dixon and McTiernan JJ, said (at p526):—

> "If the word 'possession' were given the extended meaning of which it is capable in the law it would include many cases of constructive possession where the real connection of the accused with the gold was ambiguous and uncertain, and where it would not be fair to throw so great an onus upon him. In the context it therefore appears right to construe the words 'possession or control' as referring to *de facto* possession and actual control and not to extend the word 'possession' to constructive possession. The result is much the same as if the word 'actual' had been written before the word 'possession'...."

In s233 of the original *Customs Act* 1901 (Com.) the word "possession" was given a meaning which was wide enough to embrace the case where goods were found in a Customs store where the defendants had placed them: *Irving (Collector of Customs for Qld.) v Nishimura* [1907] HCA 50; (1907) 5 CLR 233; 14 ALR 203. But the form of that section was altered in 1910 and at the same time s233B was introduced, and the obligation to establish a reasonable cause for the possession was thrown upon the person concerned. On the reasoning adopted in *Williams v Douglas*, the word "possession" in s233B(1)(ca) ought to be given the meaning attributed to it in that case. But the meaning thus attributed to the word "possession" does not confine it to physical custody. In *Williams v Douglas* the joint judgment proceeded (at pp526-7):

> "... but *de facto* possession is a conception which is itself more extensive than that of physical custody. It is wide enough to include any case where the person alleged to be in possession has hidden the thing effectively so that he can take it into his physical custody when he wishes and where others are unlikely to discover it except by accident."

Rich J in his judgment at p527 said:

> "Possession does not mean actual physical possession or manual detention. 'Suppose I request a bystander to hold anything for me, it still remains in my possession. So also possession may be required or retained over goods which are in the manual detention of a third person': *R v Sleep* [1861] EngR 106; [1861-73] All ER 248; 169 ER 1296; (1861) Le and Ca 44, per Willes J and the phrase possession and control denotes the right and power to deal with the article in question... In any given case it is necessary to take into consideration all circumstances and the nature of the thing the subject of the inquiry."

In *Moors v Burke* [1919] HCA 32; (1919) 26 CLR 265; 25 ALR 213, a case on the Victorian *Police Offences Act*, where the words in the statute were, at that time, "having in his actual possession or conveying", the High Court, in a judgment to which Rich J was a party, equated the expressions used to "actual personal control" and as not covering a case where a person 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 each of these High Court cases the property was found in a place to which another or others than the defendant had access; in *Williams v Douglas*, under a bath in the common bathroom of an hotel in which the defendant was residing; in *Moors v Burke* in a locker used by the defendant in a Customs shed, but also used by another Customs officer as of right. In the two cases the conclusion was different; in the former case, that there was a foundation for a finding that the defendant had the property in his possession; in the latter case, that there was no foundation for a finding that he had it in his "actual possession." The difference was due in some small degree to the difference in the language used in the statutes, but in the main to the fact situation in the former case being such that there was the basis for an inference that the defendant had secreted it in the bathroom in such circumstances as to keep it effectively within his control because others were unlikely to discover it except by accident, while in the latter case the fact situation did not justify an inference that the defendant had placed it in the locker in circumstances that were such as to keep it effectively within his control.

In the instant case it was open to the jury to find on the evidence of the agents at North Wharf Road that the article the applicant had had in his possession at North Wharf Road was not a parcel but the shopping bag found a few hours later at Carlton, and that what was in the shopping bag at North Wharf Road was not the mask produced which would not fit into the bag, but something that merely filled the bottom of the bag. It was open to them to find that the applicant had conveyed the bag to the house at Carlton, that his girlfriend room-mate had no knowledge of it, and that he had placed it under the clothes in the tea chest belonging to her, where he would know where it was and be able to recover it at will, and where she would, although having the right to resort to the tea chest, be unlikely, having regard to the fact that she had left the tea chest unpacked and uninspected for two months, to discover it except by accident, or, if she did discover it, to take it away. It was then open to them to draw the inference from his hiding the bag in this way and from his false denial, when it was discovered and before the contents had been shown to him, that he had even seen the bag before, and from the fact that when discovered it actually contained opium, that he had the guilty knowledge when it was discovered that it in fact contained opium and that it had contained opium when he had hidden it away.

On this basis there was evidence upon which the jury could find that the applicant, at the time of the search at the Carlton house, had the opium in his possession, within the proper meaning of that term in the statutory provision. The learned Judge therefore rightly rejected the submission to the contrary made at the end of the Crown case.

The ground taken in the notice of appeal that "the judge was wrong in his definition of possession" has been expanded to a contention that the learned Judge in his charge misdirected the jury or failed to direct the jury adequately as to the nature of "possession".

After setting out the terms of the relevant provision in para.(ca) and saying that "reasonable excuse" could be put aside, because the accused had denied that he had the prohibited import in his possession, and therefore the issue was whether he had it in his possession, and the Crown had to establish that, the learned Judge said that there was a legal concept of "possession" which he had to explain to them. A little later he continued as follows:—

> "That brings me back to the question of possession and this is where the battleground is. It is actually a short case to encompass. It is not a complicated case—it appears to me anyway it is not a complicated case. The issue is whether or not the accused had this stuff in his possession. It is a matter for you but that is the way it appears to me. I am not saying it is easy to decide—whether it is easy to decide or not is something that only you know about, it only concerns you, but it is not complicated.
>
> "There are two elements in possession—a physical and a mental element. The mental element is the

intention of the person concerned to exercise dominion and control over the particular item. The physical element is the exercise by that person of dominion and control over that item. The way in which the dominion and control is exercised will, of course, vary with the circumstances and with the nature of the item. For example, you are seated here in the jury box and, no doubt, in your homes you have the usual items of furniture. Now those items of furniture are in your possession. You are exercising dominion and control over them even though you are still sitting in the jury box—they are still in your possession because, having regard to their nature, the dominion and control which would be expected to be exercised is being so exercised, furniture is in your home and that is where you would expect it. One does not ordinarily walk down the street carrying one's dining room table. You also intend to exercise dominion and control over them. They are in your possession. The item might be a watch. In the ordinary way dominion and control is exercised over a watch generally by wearing it. That would be expected but if you are going to indulge in violent exercise of some kind, you may take your watch off and leave it in a convenient place—beside the tennis court or the swimming pool, whatever it may be—or you may put it in a locker, but you are nonetheless exercising dominion and control and you are nonetheless in possession of it. If I am invited out to dinner, I go to my friend's home, I carry an umbrella to guard against the elements, and I place it in the umbrella stand and go off and I am sitting at his table eating my meal—that umbrella is still in my possession even though I am in the dining room eating a meal and that umbrella is in the hall-stand because I intend to exercise dominion and control over that at all times and I do exercise such dominion and control that is appropriate in the circumstances.

"That, then, is what is involved in the crime and what is involved in possession and it will be for you to decide whether or not you are satisfied beyond reasonable doubt, having regard to the evidence, that the accused was in possession of the opium on 9 March."

The learned Judge then reviewed the evidence given by the two agents who observed the applicant at North Wharf Road and the evidence of the three agents who recounted the circumstances of the search and the finding of the bag at the Carlton house. He referred also to the evidence relating to the identification of the contents of the bag as opium and to the applicant having picked up the Balinese mask at the quarantine station at some time. The charge then proceeded:—

"And that is the case for the Crown. The Crown says on that, 'Well, he is a person who is seen carrying a bag of a given description about twenty past nine or thereabouts. It is true we do not know what was in it at that time, but it is equally true that later on in the afternoon that day the accused man is found sitting up there by himself in the lounge room in a place that he customarily uses as his home, that the bag is in a tea chest underneath some blankets, some quilts or clothing or something. He is the only one there and we open the bag and, lo and behold, it's got opium in it'. You ought then to infer from that that the accused man was the person who conveyed the bag to the place in which it was ultimately found; that he conveyed it knowing that there was opium in it and he put it in a convenient place, such as I might have left my umbrella in the stand in the entrance hall. The mere fact that he was not carrying it around with him does not mean that it was not in his possession. He was exercising the dominion and control over that and he intended to exercise dominion and control over that opium that might be reasonably expected in the circumstances.

"The Crown says, of course, that you must consider whether or not you would be prepared to draw the inference from all this evidence that he was exercising that dominion and control, and that he intended to. Having considered whether or not you will draw that inference and made up your mind that you will draw it if you do, then you must consider whether it satisfies you beyond reasonable doubt, or whether it leaves a reasonable doubt in your mind as to whether or not the accused was in possession of it. The Crown says that you ought not to, if you use your good sound common sense that characterises juries."

The learned Judge then reviewed the accused's evidence as to the circumstances of occupation of the Carlton house; his denial of it being the shopping bag and opium he had had at North Wharf Road, and his assertion that it was the mask; and the accused's account of the search at Carlton. He set out also the supporting evidence of the driver of the car at North Wharf and the applicant's room-mate at Carlton and the claim by her that the tea chest was hers and the opium was not and she had never seen the bag before. After setting out and commenting on points bearing on possession by the applicant which had been made by counsel for the defence in his address, he continued:—

"He said further that the Crown had not excluded the possibility that someone else put the opium there. He said that it is not suggested that it was the narcotics people who planted it there, but the Crown have got to satisfy you beyond reasonable doubt that it was the accused man who was at

that time in possession of the opium, then and there.

> "Well, you heard Mr Gaffy in his brief observations to you. He invited you to say that if you look at the circumstances here, you look at just the evidence, plain common sense would suggest to you that there could not be any doubt in this matter at all. Whether that is so or not is a matter for you."

It is complained that the examples given of the furniture, the watch and the umbrella, the ownership of which was assumed, were of little assistance where the property concerned was not personal belongings and no assumption of ownership was to be made. But the examples were only given to illustrate the fact that the exercise of dominion and control did not depend upon maintaining manual custody and that the form it might take depended upon the circumstances. Then it was said that the charge was deficient in its statement of what constituted possession and in not emphasizing the necessity of knowledge by the applicant of the nature of the property in question, and, in particular, the contents of the shopping bag.

But the attention of the jury was directed to the need for physical dominion and control in some form over the particular items and the intention to exercise it; and they were told that the Crown case was that the accused had put the bag, knowing there was opium in it, in a convenient place, where he was exercising, and intending to exercise, the dominion and control over it that might be reasonably expected in the circumstances; and that they had to consider whether they were prepared to draw that inference and whether they were satisfied beyond reasonable doubt about the accused's possession. This embodied a direction that they had to be satisfied that the accused when depositing the bag in its place knew that there was opium in it. It implied a direction that they should pay attention to the question whether the manner of depositing the opium in a convenient place was such as to enable the exercise of dominion and control over it by the applicant. It might have been helpful to refer them, in particular, to the possibility that the manner of depositing the bag in the tea chest was such as was unlikely that it would be discovered even by the applicant's room-mate except by accident, and that their relationship could make it improbable that she would interfere with it. But these are aspects of the fact situation which the jury might be expected to explore for themselves in determining whether there was an exercise of dominion and control by the applicant and whether he intended to exercise it. In this connexion it is pertinent to bear in mind what was said recently by Lord Morris of Borth-y-Gest in *McGreevy v DPP* [1973] 1 WLR 276, at p281; [1973] 1 All ER 503, in a context which is not inapposite:—

> "The particular form and style of a summing up, provided it contains what must on my view be certain essential elements, must depend not only upon the particular features of a particular case but also upon the view formed by a judge as to the form and style that will be fair and reasonable and helpful. The solemn function of those concerned in a criminal trial is to clear the innocent and to convict the guilty. It is, however, not for the judge but for the jury to decide what evidence is to be accepted and what conclusion should be drawn from it. It is not to be assumed that members of a jury will abandon their reasoning powers and, having decided that they accept as true some particular piece of evidence, will not proceed further to consider whether the effect of that piece of evidence is to point to guilt or is neutral or is to point to innocence."

In the circumstances it cannot be said that the jury were left without adequate direction on this matter.

It is necessary now to turn to the other aspect of this submission made at the end of the Crown case—that there was no case to answer because there was no evidence that the suspicion that the opium had been imported into Australia in contravention of the Act was entertained at a time when it was in the possession of the applicant. This is the subject of ground 2 in the notice of appeal:

> "2. The judge was wrong in not holding that the suspicion had to be contemporaneous with the possession."

This contention rested, first, upon the proposition that the evidence showed that at some stage there was a taking of manual custody of the bag and its contents by one or other of the narcotic agents with the intention of excluding the applicant from possession; and that it was only after that when in law any possession by the applicant had ceased, that Hill formed the relevant suspicion. Reliance was then placed on the further proposition of law that under the statute the suspicion must be contemporaneous with the possession.

It is convenient to deal with the first of these propositions. The evidence of Vaughan is capable of being understood as meaning that there was no manual lifting of the bag by Vaughan before he called Hill over to him and it was only for the purpose of Hill examining it that it was pulled out of the tea chest and opened to enable both to look into it. And the evidence of Hill is that he then formed the suspicion from the smell of the substance that the contents were prepared opium with which he was familiar and that it was being brought into Australia, so he took the bag over to the applicant and asked him if it were his and opened it in front of him.

The question to which this account gives rise is whether the pulling of the bag from the tea chest to enable its contents to be inspected involved a transfer of possession from the applicant to the agent who pulled the bag out of the chest. The handling and moving of articles of property in the course of a search lacks, however, the intention to exercise dominion and control which is necessary for the acquisition of possession: *R v King* [1938] 2 All ER 662; *Hawes v Edwards* (1949) 93 Sol Jo 358; 113 JP 303—both cases of physical examination. Until the suspicion of illicit importation had been formed there would be no occasion for taking possession of the bag and its contents with the intention of depriving the applicant of possession of them.

On the basis of the view of the evidence set out above there was therefore no foundation for the submission made. But the jury were never called upon to direct their attention to the evidence and to the finding of the relevant facts. On the submission being made the learned Judge ruled that the suspicion did not have to be contemporaneous with the possession. He therefore gave no direction to the jury in his charge about this other than to tell them that it was a matter for them to say whether they were satisfied that Hill did suspect the opium and whether it was reasonable in the circumstances to do so. In giving his ruling the learned Judge made it clear that he did so because he distinguished the operation of the statutory provision in s233B(1)(ca) of the *Customs Act* from that of s26 of the *Summary Offences Act* 1966, and therefore held that he was not bound by the authorities bearing on that section.

If this ruling is correct, there was nothing for the jury to consider other than what they were directed to consider. If it were not, the jury were not allowed to consider what finding they should make as to the facts to which the evidence related. For the applicant, reliance was placed on the authorities on s26 of the *Summary Offences Act* from and after *McDonald v Webster* [1913] VicLawRp 114; [1913] VLR 506; 19 ALR 563. Further it was said that in any case the words in para. (ca)— "which are reasonably suspected of having been imported" etc.—are part of the description of the prohibited imports which are the subject of the possession and they imply co-existence with the possession. It was said that any other construction could involve hardship by reason of delay in the formation of the suspicion, and that being a penal enactment the language of the provision should be construed narrowly.

For the Crown it was contended that these authorities did not apply and it was denied that the construction contended for was the proper one. It was said that while the words "are suspected" refer to a point of time, it is not necessarily the point of time at which possession exists and may be any point of time thereafter, although admittedly there could be no offence until the suspicion came into existence. On the basis of the need for adopting a construction which would make the provision work reasonably, it was pointed out that it applies to a variety of substances many of which require identification and in respect of which the prohibition of importation may depend on the absence of a ministerial permit or the failure to comply with conditions or other matters calling for investigation, and this is incapable, in practice, of being determined at the same time as the substances are found in the possession of the defendant. And further, that the effective operation of the provision could readily be defeated by an abandonment of possession before these things could be done. It was also contended that the argument that the postponement of the time at which suspicion must come into existence could produce a harsh operation of the provision is countered by the fact that it deals with narcotics and their entry into Australia, and such a subject-matter may well have been thought to call for the application of onerous measures.

There is no reason why the authorities on the provision dealing with property suspected of having been stolen should be applied to the totally different subject-matter and somewhat different language of para. (ca). The matter must be regarded as one of construction in the light of the context and subject-matter. Although penal laws are to be construed strictly yet the intention of the legislature must govern in the construction of penal as well as other statutes, and they are

not to be construed so strictly as to defeat the obvious intention of the Legislature: see per Fuller CJ in *United States v Lacher* [1890] USSC 140; 134 US 624, at p628, cited by Barton J in *Lyons v Smart* [1908] HCA 34; (1908) 6 CLR 143, at pp157-8; [1908] HCA 34; 14 ALR 328. It is only where the language of the statute fails to reveal a meaning and no sure conclusion as to it can be reached by a consideration of the provisions and subject-matter of the legislation that resort needs to be had to the principle that a construction against extending penal categories should be adopted: *R v Adams* [1935] HCA 62; (1935) 53 CLR 563; [1935] ALR 421.

In the case where the initial conception is possession of any personal property whatsoever it is an easy step to conclude that it was intended that there should be some element of criminality or culpability about the possession itself and that therefore the suspicion of the property being stolen should be a coincident of the possession. But where the initial conception is possession of narcotic goods prohibited as imports the conclusion that the intention was that the suspicion should be a coincident of the possession in order to import criminality or culpability is not so obvious, and the justification for deferring the time for forming a suspicion is more apparent.

In the context of para. (ca) there is to be found no good reason (apart from some possible harsh operation in particular situations resulting from suspicion arising after long delay) for attributing to the legislature the intention of insisting on the suspicion of illegal importation being formed at the same time as the possession of the narcotic goods is found to exist. The language does not reflect any such intention. On the other hand there are strong reasons for attributing to the legislature an intention to leave room for the practical consideration of not tying the formation of a suspicion to possession, but letting it depend upon the checking of the identity of substances found and of compliance with conditions of importation after possession had ceased. In its essence s233B is a piece of legislation directed at the suppression or control of narcotic drugs. In this connexion reference may be made to the observations of Lord Guest in *R v Warner* [1969] 2 AC 256, at pp300-1; [1968] 2 All ER 356; (1968) 52 Cr App R 373; [1968] 2 WLR 1303. The section deals with substances the possession of which can easily be abandoned and the identification of which may involve examination or even analysis and in respect of which the circumstances of importation may call for inquiry. None of this can adequately be provided for if the construction is adopted that the suspicion of illicit importation must exist before possession is abandoned or lost. Even in the case where the substance is readily identifiable and the circumstances permitting importation of such substances is known the coincidence of suspicion with possession could readily be destroyed by the party in possession throwing it away or otherwise abandoning it before it is possible to make an examination. Having regard to these considerations a construction which favours a practical operation of the provision and which the language permits to be adopted ought to be preferred.

In our opinion, the learned Judge's charge should on this subject be accepted as correct. This deals with all the grounds of appeal that were pursued. All the contentions for the applicant therefore fail. The application for leave to appeal against conviction should therefore be dismissed.

Attention can now be directed to the application for leave to appeal against sentence. The sentence was one of five years' imprisonment with a minimum term of four years before becoming eligible for parole. *[After referring to relevant matters concerning sentence, the Court said]* ... The necessity of having regard to the deterrent factor in relation to such an offender and such an offence is therefore obvious. We have had the benefit of perusing (with the acquiescence of both parties) transcripts of proceedings of various courts in Australia when sentences were imposed for comparable offences, relating in some cases to hard drugs and in some cases to soft drugs and in one or two cases to opium. With this assistance, and with the aid of what was said by this Court in *R v Piercey* and taking into account all the circumstances we have referred to, including the necessarily revised view of the offence committed in April 1972, we have come to the conclusion that the appropriate sentence is a term of four years' imprisonment with a minimum term of three years. The application for leave to appeal against conviction is dismissed. The application for leave to appeal against sentence is granted, the appeal will be allowed and the sentence varied by substituting for the term imposed a term of four years' imprisonment with a minimum term of three years before becoming eligible for parole. Orders accordingly.

Solicitors for the applicant: Ellinghaus and Weill.
Solicitor for the Crown: RB Hutchison, Commonwealth Crown Solicitor.