12/90

SUPREME COURT OF VICTORIA

PATTEN v ADAMS

Marks J

1 March 1990

SUMMARY OFFENCE – UNLAWFUL POSSESSION – EVIDENTIARY BURDEN ON PROSECUTOR AND DEFENDANT – PROPERTY IN DEFENDANT'S POSSESSION SUSPECTED – DEFENDANT UNABLE TO PRODUCE RECEIPTS – INCONSISTENT ANSWERS AS TO HOW PROPERTY OBTAINED – WHETHER INFORMANT'S SUSPICION REASONABLY-BASED – WHETHER DEFENDANT HAD A CASE TO ANSWER: *SUMMARY OFFENCES ACT* 1966, S26.

1. On a charge of unlawful possession laid pursuant to s26 of the *Summary Offences Act* 1966, an onus is on the police informant to provide evidence of a reasonably-based suspicion that certain property in the defendant's possession has been stolen or unlawfully obtained. If a court is of the opinion that the informant's suspicion was a reasonable one, the defendant is guilty of the offence unless proof is led, on the balance of probabilities that possession of the property was honestly obtained.
***Tepper v Kelly* (1987) 45 SASR 340, referred to.**

2. Where as a result of certain information a police officer visited shop premises where the defendant dealt in precious metals and jewellery, saw some gold in packages on a shelf in respect of which the defendant was unable to produce receipts and gave contradictory answers, there was sufficient evidence of facts capable of founding a reasonable belief that the police officer suspected that the gold had been stolen or unlawfully obtained. Accordingly, the presiding magistrate was in error in upholding a no case submission and dismissing the information.

MARKS J: [1] This is the return of an order nisi made by Master Evans on 27 November 1989 after first entertaining the application on 24 November 1989, to review the dismissal of an information before the Magistrates' Court at Melbourne on 25 October 1989 under s26 of the *Summary Offences Act* 1966.

The order was made on a ground which is, to say the least, not felicitously worded but which appears to raise the issue argued here, whether the Magistrate could have reasonably concluded that the evidence did not disclose a foundation for a reasonable suspicion on the part of the informant. [*His Honour set out the terms of s26 and continued*] ... **[2]** although the offence which is commonly referred to as unlawful possession has been on the statute books of this State for many years, it was not until 1966 that the word 'reasonably' was inserted before the word 'suspected'. Accordingly, the cases prior to 1966 are not helpful as to the meaning of this added word.

There is, however, a useful statement by Cox J in the Supreme Court of South Australia, in *Tepper v Kelly* (1987) 45 SASR 340 at p343. After referring to the sister provision in the South Australian statute, His Honour said:-

> "It is a striking, and controversial, instance of Parliament reversing the onus of proof in the creation of a criminal offence. The Prosecutor has to prove that the defendant had the personal property in question in his possession and that someone actually entertained at a relevant time, a suspicion that the property had been stolen or unlawfully obtained. Then, if the Court finds that the suspicion was a reasonable one, the defendant is guilty of the offence unless he proves, on the balance of probabilities, that he obtained possession of the property honestly."

His Honour went on to quote *Almond v Lenthal* (1929) SASR 267; *O'Sullivan v Reedy* [1953] HCA 36; 87 CLR 291; [1953] ALR 611; and *Forrest v Normandale* (1973) 5 SASR 524. I think it could be said that what His Honour stated in effect meant this – that the onus on the prosecution was merely to provide evidence of a suspicion to the required effect, but that it was necessary that there be in the evidence for the prosecution some foundation reasonably capable of supporting that suspicion.

[3] In the present case I have concluded that the Magistrate did not direct himself correctly and that, for reasons which I propose to elaborate, the order nisi must be made absolute. The circumstances on which the prosecution relied might shortly be stated. On 11 May 1989, the informant together with other police officers entered shop premises on which the defendant conducted a secondhand trading business, including dealing in precious metals and jewellery. The police officers had a search warrant which did not relate to the offence of which the defendant came to be charged. When on premises, however, the informant and other officers observed gold in packages, one of which they appear have selected to be the subject of the information. There was evidence that the police officers had been told by an informer that they might be expected to find on the premises gold which had been stolen. For some reason which is not apparent from the evidence, they pointed to some gold in a packet on a shelf and asked the defendant questions about where he had obtained it and whether he had purchased it, and told him of their suspicion that it had been stolen.

It is unnecessary to detail all the things that were said and done, save to note that the defendant at first told the informant and other police that the gold was his, that it had been purchased from a particular source, and that he had receipts for it. After further questioning, the defendant was unable to produce receipts and gave inconsistent and, in some cases, contradictory answers.

[4] In the upshot, the evidence before the Magistrate would have entitled him to conclude that there was no satisfactory explanation as to where or from what source the defendant had obtained the gold; that he was unable to produce receipts for its purchase and that in providing answers, he had prevaricated, had been inconsistent and said that he had purchased the gold from a particular source which failed to verify that it had indeed been the source from which the defendant had obtained the gold.

The Magistrate dismissed the information by acceding to what has been referred to in the material as a submission that there was no case to answer. A submission that there was no case to answer could only have been a submission that there was no or no sufficient evidence on which the Magistrate was entitled to call on the defendant to provide the defence open to him under the statute. The task of the magistrate therefore was not to assess the credibility of witnesses or to express a final view about the information, but merely to direct his mind to considering whether there was evidence on which a tribunal of fact acting reasonably could say that there was a *prima facie* case which required the defendant either to give his answer, if he had one, or indicate to the court which of the courses open to him he proposed to take.

The Magistrate appears not to have approached the matter in that way. There is in the material conflicting versions as to what precisely the Magistrate said. Accordingly to the affidavit filed on behalf of the defendant, on which in the circumstances it seems proper to **[5]** rely, the Magistrate is recorded as having said that the legislation was unusual in that it reversed the onus of proof, but that he would apply it strictly as he was bound to do. He went on to say that he was not satisfied that the police suspected the goods rather than the defendant. The Magistrate has then attributed to him two observations about the nature of the replies given by the defendant to the police in the interviews. If that version is correct, and it is conceded it is a little difficult to follow, the Magistrate appears not to have applied his mind to the considerations he was bound to give, namely, whether there was in the evidence a foundation for the evidence before him that the informant reasonably suspected that the gold had been stolen. If the Magistrate had applied his mind in that way, he could not have but come to the conclusion that the evidence of the matters to which I have referred were at the very least capable of constituting a belief which was reasonable as required by the statute.

When the Magistrate said, as he is purported to have, that he was not satisfied that the police suspected the goods rather than the defendant himself, he in effect begged the true question, namely, whether there was evidence of facts capable of founding a reasonable belief, as was the evidence, that the informant and the other police suspected that the gold had been stolen. There was no evidence that the informant founded his suspicion on what he knew of the applicant. Insofar as he mentioned his knowledge of the applicant, his antecedents and his character, that evidence was specifically excluded by the Magistrate and having **[6]** excluded it the Magistrate was bound to consider only that evidence which he ruled admissible. The observation that the

police suspected the defendant rather than the goods, seems to have been gratuitous, and in the circumstances only peripherally, if at all, relevant. I repeat that the Magistrate was obliged to consider whether the evidence for the prosecution to the effect that the suspicion related to the goods and that it was reasonably based, was supported by facts elicited in evidence.

For the reasons that I have stated, I believe the Magistrate was in error in failing to consider the evidence which was pertinent to the submission on which he was obliged to rule and accordingly was in error. The decree nisi is made absolute with costs.

APPEARANCES: For the plaintiff Patten: Mr SP Gebhardt, counsel. Victorian Government Solicitor. For the defendant Adams: Mr R Van der Wiel, counsel. Lewenberg & Robson, solicitors.
