17/89

SUPREME COURT OF NEW SOUTH WALES

TEGGE and ANOR v CALDWELL and ANOR

Yeldham J

11 November 1988 — (1988) 15 NSWLR 266; 36 A Crim R 8

CRIMINAL LAW – UNLAWFUL POSSESSION OF PROPERTY – ONUS OF PROOF – NATURE OF EVIDENTIARY BURDEN ON DEFENDANT – WHETHER ON BALANCE OF PROBABILITIES OR BEYOND REASONABLE DOUBT.

1. When hearing a charge of unlawful possession, the Court has a duty to decide whether it is satisfied beyond reasonable doubt that it was proper to entertain a reasonable suspicion that the goods, the subject of the charge, were stolen or unlawfully obtained. If the court is so satisfied it should convict if the defendant does not give an account on the balance of probabilities to the satisfaction of the Court as to how the defendant came by the property.

***Ex parte Patmoy; Re Jack and Anor* (1944) 44 SR (NSW) 351; 61 WN (NSW) 228, applied.**

2. A magistrate was in error in stating that the defendant's onus was not discharged if the court was left in any doubt, because it was open to conclude that the defendant was being required to satisfy the court beyond reasonable doubt that he came by the goods lawfully.

YELDHAM J: *[After setting out the nature of the charges and certain statutory provisions, His Honour continued]* ... The Crown here concedes that his Worship erred in his determination of the proceedings brought against each plaintiff because of the wrong application by the learned magistrate of the relevant standard of proof resting upon each plaintiff (and by "plaintiff" I of course refer to the plaintiffs in the present action who were the defendants in the court below). In the case of the plaintiff Tegge the magistrate said this, *inter alia*:

> "As I was saying, the question to be determined in matters of this nature is whether all the circumstances proved in evidence might lead a reasonable man to the conclusion that when the goods were in the defendant's possession and on the date charged that they had been stolen or unlawfully obtained. The onus on the defendant as showing that he came by the goods honestly is not discharged if the court is left a doubt. On the defendant's evidence as to how he came by the goods I must have a doubt and accordingly I find the offence proven."

In the case of the plaintiff Squirrell his Worship said this, *inter alia*:

> "The evidence of the defendant was in my view totally unsatisfactory.... The onus on the defendant as showing that he came by the money honestly is not discharged if the court is left in any doubt. I do have a doubt and I find the offence proved."

The reference to the existence of a doubt precluding any discharge on the onus lying upon a defendant in circumstances such as the present was obviously taken from a note appearing in Watson and Purnell: *Criminal Law in New South Wales*, Volume 1, Indictable Offences, paragraph 1323. There the note says:

> "The onus on the defendant of showing that he came by the goods honestly is not discharged if the court is left in doubt."

That annotation, in my opinion, is quite erroneous. It purports to be based on two cases, one in Western Australia and the other a decision of the High Court in *Willis v Burnes* [1921] HCA 43; (1921) 29 CLR 511. The headnote to that case is equally erroneous and perhaps explains the error made by the editors of the criminal law book to which I have referred. *Willis v Burnes* is referred to in the well-known decision of Sir Frederick Jordan CJ, with whom the other members of the court agreed, in *Ex parte Patmoy; Re Jack and Anor* (1944) 44 SR (NSW) 351; 61 WN (NSW) 228. There, at page 358, his Honour referred to the decision of the High Court in *Willis v Burnes*, analysed it, and observed that it certainly does not decide that the accused is required to discharge the criminal onus.

Such case emphasised that it was the duty of the magistrate, in a charge under what is now section 527C, to decide on the evidence whether he is satisfied beyond reasonable doubt that it was, at the time of the hearing, proper to entertain a reasonable suspicion that the goods were stolen or unlawfully obtained. If he was so satisfied he should convict if the accused did not give an account on the balance of probabilities to the satisfaction of the justice as to how he came by the same. That, of course, is quite different from holding that the onus on a defendant of showing that he came by the goods honestly is not discharged if the court is left in a doubt.

Such a summary of the alleged situation does not draw any distinction between the criminal and civil onus. A court could still be left in doubt, but find that a defendant had discharged the onus lying on him on a balance of probabilities. If left in a doubt which is reasonable then, of course, the onus would not be discharged if it was the criminal onus, which it is not, so far as a defendant is concerned. Hence the annotation, I think, is quite misleading, as is the headnote upon which it purports to be based.

The Crown concedes in the present case that his Worship, not unnaturally in view of the reference in the standard textbook which I have mentioned, did err in relation to the question of onus. That error is not in placing the onus in the wrong place, but applying a test which may, and probably did, require the defendant in the particular matter to satisfy the court beyond reasonable doubt that he came by the goods, the subject of the charge, lawfully. Thus it follows that there was an error. *Prima facie* that error would entitle the plaintiffs to the relief which they seek by way of an order under s112 precluding the defendants from proceeding upon the conviction, and perhaps also an order quashing the conviction.

In the case of the plaintiff Tegge those are the orders which I propose to make. He is apparently in custody in Queensland. The magistrate did not make the adverse comments in relation to his evidence which he made in relation to Squirrell, and I think that there are no discretionary reasons why this court should decline to grant him the relief to which, *prima facie*, he is entitled.

But I think that in the case of Squirrell the situation is different. Mr Buchanan, counsel for both plaintiffs, has argued with some force, and has supported this by careful and detailed written submissions, that this court, once it finds that error has been made, should proceed to grant the relief envisaged by s112 and, in addition, should quash the conviction, a situation to which that section is not expressly addressed.

[His Honour considered the nature of the remedy of statutory prohibition, and in respect of the defendant Squirrell, declined to quash the conviction, thereby leaving it to the defendant, if he desired to do so, to lodge an appeal to the District Court].

[Judgment reprinted with kind permission from 8 NSW Petty Sessions Review p3801.].
