04/73

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v LACHMAN

Smith, Pape and Anderson JJ

9 March 1973

CRIMINAL LAW – DEFENDANT CHARGED WITH HOUSEBREAKING AND STEALING AND ATTEMPTED BRIBERY – PROPERTY STOLEN FROM THE FLAT – DEFENDANT DROVE A MOTOR CAR AND HIS PASSENGER WAS LATER APPREHENDED WITH A SATCHEL IN HIS POSSESSION CONTAINING SOME OF THE RECENTLY STOLEN PROPERTY – DOCTRINE OF RECENT POSSESSION – SATCHEL WAS THE JOINT PROPERTY OF THE PASSENGER AND THE DEFENDANT – AT THE TRIAL JURY TOLD THAT AS THE DEFENDANT WAS THE CO-OWNER OF THE SATCHEL THAT WAS SUFFICIENT TO CONCLUDE THAT THE DEFENDANT WAS IN POSSESSION OF THE CONTENTS OF THE SATCHEL REGARDLESS OF HIS KNOWLEDGE OF WHAT WAS IN THE BAG – DEFENDANT FOUND GUILTY.

HELD: Appeal allowed. Conviction set aside. Order for a new trial.
1. The direction given by the trial judge was open to the objection that it would have been taken to mean that the fact that the defendant was co-owner with his partner of the satchel was sufficient in law to justify an inference or conclusion that the defendant was in possession of the contents of the satchel regardless of any question about his knowledge of what was in the satchel.

2. The trial judge was in error in directing the jury that once they were satisfied that the satchel contained the stolen property then they might think that that justified the invocation of the doctrine of recent possession.

SMITH J: This applicant was presented for trial in the County Court on a charge of housebreaking and stealing and a charge of attempting to bribe a public official, namely, a police officer. On 27 November 1972, he was convicted on both counts and he has been sentenced to six months' imprisonment in respect of each offence, with a direction that three months of the sentence on the second charge be served concurrently with the sentence on the first charge, so that the effective term of imprisonment was nine months. He now applies to this Court for leave to appeal against conviction and against sentence.

The housebreaking, to which the first charge related, took place in a flat in Moreland Road, Coburg. A variety of property was taken from the flat, the value being about $640. There was no contest at the trial upon the question whether the housebreaking had taken place. The defence to that charge was an alibi. The second charge was based on an allegation by the arresting police that the applicant admitted the housebreaking and offered $1300 to them to forget about that offence. The offering of the bribe was denied by the applicant, as was the alleged admission of the housebreaking. Evidence was given by a number of police officers that on the day of the housebreaking they were in Collins Street, opposite the Hotel Australia, when a car stopped outside that hotel. They said that it contained two persons, one of whom got out of the car and the other of whom drove the car off. Three of the police officers identified the applicant as the driver of that car. The police evidence was that the man who left the car was carrying a satchel, that they followed him into the hotel and into a room in the hotel, that the satchel was there opened and was found to contain certain articles, one at least of which was identified by other evidence as being part of the property stolen from the flat. After some of the police officers had left the room, the applicant entered it. He was asked his name and gave a name and according to the police he told them that the room was his, that he shared it with the man who brought the satchel there.

The police evidence was that the applicant was shown the satchel and asked what he knew about it, and that his reply was, "Yes, it is our bag." The applicant was not examined in-chief, nor cross-examined about the satchel or its contents when he came to give evidence at the trial. Police evidence was given of admissions by the applicant of the housebreaking and of his having offered the alleged bribe.

In his original notice of application for leave to appeal against conviction, certain grounds were set out, but upon application made to this Court leave was given to substitute five grounds for those stated in the notice. It is not necessary to refer to any of those substituted grounds other than those numbered 3 and 4. Ground 3 is in these terms:

> "That the learned trial judge was wrong in law in his direction to the jury that if the jury were satisfied to accept the accused man's admission that the bag belonged to him and Swaka — I interpose that Swaka was the name of the man who carried the satchel — "then the jury would be justified in concluding that the accused man was in possession of recently stolen property."

Ground 4 is in these terms:

> "That the learned trial Judge was wrong in law in his direction to the jury that if the jury were satisfied that the admission allegedly made by the accused, namely "It is our bag", is a true answer, and that if the jury were satisfied that the recently stolen property from the crime that he is charged with was in the bag, then the jury would be entitled to infer by reason of that circumstance alone that he is the thief."

The passage in the learned judge's charge to which these grounds relate is in these terms:

> "I have not mentioned the question of the possession of the stolen property. If you were satisfied that the property in this bag, or some of it, came from the girls' flat, and if you were satisfied to accept the accused man's admission that the bag belonged to he and Swaka, then you would be justified in concluding that the accused man was in possession of recently stolen property; that is, if you made all these findings. The law is that you are entitled by reason of that fact alone to infer that the accused man was the thief or one of the thieves, of that property, if the accused man provides no explanation for his possession of the property. In this case he has provided no explanation for his possession of the property. His answer is that he was not in fact in possession of it, but I am now putting to you that if you were satisfied that he was in possession of stolen property, in the sense that there was stolen property in the bag which was in the joint possession and under the control of the accused man together with another, well then that circumstance alone would entitle you to infer that he was one of the persons who stole the property. The property was very recently stolen and if that is the case the law says you are justified in drawing that guilty inference that he was the thief, if he puts forward no explanation of his possession. Once again, all that turns on the findings you make upon the evidence as to whether you are satisfied, first of all that the property did come from the girls' flat; and secondly, whether you are satisfied that it was ever in the accused man's possession; in the sense that it was under his control. To do so you would presumably have to accept that he did tell the police that the bag was owned by him and the other man, Swaka. You will remember the question about the bag, or when asked about the bag; his answer was, "It is our bag", according to the police. As I say, if you were satisfied that that was a true answer and that the bag was the bag of the accused man and Swaka, and you were satisfied that the recently stolen property from the crime that he is charged with was in the bag, well then, you would be entitled by reason of that circumstance alone to infer that he was the thief."

The charge thus given to the jury is open to the objection that it would have been understood by a jury, if taken literally, as meaning that the fact that the accused was co-owner with Swaka of the bag was sufficient in law to justify an inference or conclusion that the applicant was in possession of the contents of the bag regardless of any question about his knowledge of what was in the bag.

If the jury understood the direction in that sense, they would have been misled in a very important respect, and the circumstances of the trial were such that there would have been a very real temptation to any jury to endeavour to escape from certain violent conflicts of fact by concentrating on this matter of possession and deciding the case in the way that the Judge told them it was open to them to decide it, on the footing of the doctrine of recent possession.

The Crown has referred this Court to a number of authorities which make it clear that the passage in the charge, construed in the sense that I have stated, would be wrong in law. The Crown has not sought to support the validity of a direction on the law in the sense that I have stated, nor does it seek to maintain that this is a case which could be brought within the proviso.

In these circumstances, I am of the view that there must be an order for a new trial. I may say that I have not read out the learned Judge's report, but it relates only to the original grounds of the application which have been superseded by the new grounds.

PAPE J: I would agree with what has fallen from the learned presiding Judge, but I am inclined to think that the position is somewhat stronger than was stated by him.

It seems to me that the learned Judge did do more than charge the jury in a way which might have led them to believe that what he was saying was that once they were satisfied that the bag was the joint property of the applicant and Swaka, and once they were satisfied that it contained the stolen property, then they might think that that justified the invocation of the doctrine of recent possession. It seems to me the learned Judge really committed himself about this both at the beginning and the end of the charge. He said at the bottom of page 115:

> "If you were satisfied that the property in this bag, or some of it, came from the girls' flat, and you were satisfied to accept the accused man's admission that the bag belonged to him and Swaka then you would be justified in concluding that the accused man was in possession of recently stolen property; that is if you made all those findings."

Then at the bottom of page 116 he comes back to this, and having dealt with the question as to whether the jury should be satisfied with the applicant's statement that the bag was owned by himself and Swaka, he said:

> "As I say if you were satisfied that that was a true answer"— that is that the bag belonged to the accused and Swaka — and that the bag was the bag of the accused man and Swaka and you were satisfied that the recently stolen property from the crime that he is charged with was in the bag, well then, you would be entitled by reason of that circumstance alone to infer that he was the thief."

In my view, he was plainly telling the jury that on those facts alone they would be entitled, but not bound, of course, to make the inference to which reference has been made.

I am therefore in agreement with the result which is proposed by the learned presiding Judge.

ANDERSON J: I agree with the result proposed I have nothing to add to what my learned brothers have said.

SMITH J: The order of the Court is that the application in relation to conviction is granted and the appeal against conviction is allowed. The convictions on both counts and the sentences thereon are set aside. There will be an order that there be a new trial.
