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SUPREME COURT OF VICTORIA

DPP v DAHL

Smith J

15, 26 September 1997 — (1997) 96 A Crim R 502

CRIMINAL LAW – UNLAWFUL POSSESSION – TV SET IN PREMISES OCCUPIED BY DEFENDANT AND OTHERS – TV SET PREVIOUSLY BOUGHT BY DEFENDANT – SEARCH WARRANT EXECUTED – WHETHER DEFENDANT IN CUSTODY FROM TIME OF EXECUTION OF SEARCH WARRANT – TV SET SUSPECTED OF BEING STOLEN OR UNLAWFULLY OBTAINED – WHETHER DEFENDANT IN ACTUAL POSSESSION OF TV SET – WHETHER DEFENDANT HAD EXCLUSIVE POSSESSION AND CONTROL OF TV SET: *SUMMARY OFFENCES ACT* 1966, S26.

Police officers attended at premises rented and occupied by D. and others. When D. arrived at the premises, a search warrant was executed on D. who then allowed the police officers into the premises. When inside the premises, a police officer saw a TV set previously bought by D. which was suspected of being stolen or unlawfully obtained. D. was then arrested and charged with unlawful possession of the TV set. At the hearing, a magistrate upheld a 'no case' submission and dismissed the charge on the basis that having regard to the fact that when the suspicion was formed D. was in custody and accordingly, not in actual possession of the TV set. Upon appeal—

HELD: Appeal dismissed.
1. A person is under arrest whenever the circumstances are such that the police have made it plain to a suspect that the suspect is no longer a free person. No particular language or form of words is required. When the search warrant was executed, D. was in custody in the sense of informal arrest and was plainly no longer a free agent. When the suspicion was formed it was not open to find that D. had the complete present personal physical control of the TV set to the exclusion of the police. D. did not have the property in his present manual control and did not have the exclusive right or power to place his hands on it to have manual custody when he wished. Accordingly, it was open to the magistrate to find that D. did not have actual possession of the TV set when the suspicion was formed.

2. *Obiter*. In view of the fact that D. had bought the TV set previously, it would have been open to a magistrate to find that D. retained exclusive custody and control of the TV set as against the other occupants of the premises. Whether this would be sufficient to establish complete, present and exclusive physical control beyond reasonable doubt may be debatable.

SMITH J: [*After setting out some of the affidavit material, the questions of law for decision, the relevant statutory provision and whether the defendant was in custody following the execution of the search warrant, his Honour continued*] ...**[10]** [T]aking the informant's case at its highest, the no case submission was to be considered having regard to the following assumed facts:

> The property in question was found within premises rented and occupied by the respondent (and at least one other):
> (i) After the respondent had been served with a search warrant obtained pursuant to subdivision 5 of the *Magistrates' Court Act* 1989 and cautioned.
> (ii) After the respondent had been frisked and searched for weapons outside the premises.
> (iii) After the respondent had at the request of the police used his keys to open the door and allow the police entry.
> (iv) After the respondent was considered by a police member to be in custody.
> (v) While the respondent was seated beside Constable Perkins and under his physical control.
> (vi) When the property was found the police member formed a reasonable suspicion that it had been stolen or unlawfully obtained; and
> (vii) The respondent was formally placed under arrest after the reasonable suspicion concerning the property had been formed.
> (viii) The respondent admitted that he had acquired and was using the property.

The reference to *Kitchen v Cox* (1996) 85 A Crim R 328 occurred because counsel for the respondent cited that case to the learned magistrate and relied upon it and it is suggested that the learned magistrate, after hearing argument from both sides about its application, purported to apply it.

[11] Question 1: Whether the learned magistrate erred in holding that the respondent did not have "actual possession" of the property in question.

The appellant submits that up until the time the respondent was formally arrested he was not in any sense in custody, other than perhaps that defined in s464(1)(c) which covers a person being questioned or otherwise investigated to determine his or her involvement in the commission of an offence if there is sufficient information possessed at the time to justify arrest. In support of this argument reliance was placed on some of the affidavit material filed on behalf of the appellant suggesting that the learned magistrate had in light of Constable Perkins' evidence spoken of the respondent being in custody in the latter sense. As I have already indicated, however, there is a conflict on the affidavit material on this point.

Applying the usual practice, the material should be accepted that supports the magistrate's decision and I should conclude that the learned magistrate did not refer to custody in the manner alleged. In any event, when one looks at the references in the appellant's affidavits to s464(1) and the question of "custody" there is no distinction drawn between the parts of the section. There are in fact three parts. One part of the definition of custody encompasses a person who "is under lawful arrest by warrant or under lawful arrest under s458 or 459 or a provision of any other Act". Thus, the appellant cannot on the material before me demonstrate that if the learned magistrate did refer to s464(1) he was not referring to a situation of lawful arrest under s458 or 459 of the *Crimes Act* or a provision of any other Act. In any event I am satisfied that the learned magistrate was using custody in the sense of informal arrest because the appellant's affidavits record that the magistrate said that the defendant was not "a free agent" and was in custody at the time the property was located.

Accepting that the learned magistrate was using the term "custody" as the equivalent of informal arrest, it was put that until the television set was found there was nothing in the evidentiary material which would provide a basis to say **[12]** that there was information in the possession of the investigating officer to justify the arrest. It was also put that the mere fact that there was a search warrant did not permit an arrest and there was nothing in the events prior to the formal arrest to support the conclusion that there had been an informal arrest. Counsel submitted that the giving of a caution did not indicate that the policeman was of the view that the person was in custody. He said it was capable of being interpreted as indicating that the policeman was acting out of an abundance of caution, so that should any admission be made thereafter which might give rise to a basis for arresting that person the admission had been made after the caution administered. Counsel conceded that there was no evidence before the magistrate that it was done for that reason. Counsel maintained, however, that the power to arrest on the facts before the magistrate did not arise until after the property was found in the house pursuant to the warrant to search. It was only then that the relevant criteria for arrest were met.

There was agreement between the parties as to the relevant authorities on the question of what constitutes an arrest. Counsel for the appellant referred to three cases relied upon by the respondents. They were *McPherson v Goldstone* [1920] VicLawRp 66; [1920] VLR 331; *Alderson v Booth* (1969) 2 QB 216; (1969) 2 All ER 271; 53 Cr App R 301, and *R v Inwood* [1973] 2 All ER 645; (1973) 1 WLR 647; (1973) 57 Cr App R 529. Counsel for the appellant conceded that a citizen is under arrest where he or she, while not formally arrested, is not a free agent and the police are purporting to exercise control over that person. In essence a person is under arrest whenever the circumstances are such that the police have made it plain to a suspect that the suspect is no longer a free person. No particular language is required or any particular form of words. What is required is that whatever occurs in the circumstances then pertaining makes it clear to the suspect that the suspect is no longer a free person. (See above cases and *R v O'Donoghue* (1988) 34 A Crim R 397 and *Hatzinikolaou v Snape* (1989) 97 FLR 86; (1989) 41 A Crim R 389; [1989] Aust Torts Reports 80-262). In reaching his decision, the learned magistrate must have concluded that it was not open to find on the informant's case, taken at its highest, that Mr Dahl **[13]** was not in custody when the suspicion was formed. The first issue to be determined is, therefore, whether the learned magistrate was in error in so concluding. I refer to the facts enumerated above. In my view, applying the above test to those assumed facts he was correct in his conclusion that it was not open to find that the accused was not in custody. He plainly was in custody.

The appellant argues further that if the learned magistrate did find that the accused was under informal arrest and that that was a proper conclusion to reach on the no case submission,

nonetheless it remained open to find on the assumed facts, taken at their highest for the informant, that the respondent had "actual possession" under s26 of the *Summary Offences Act* of the television set at the time the suspicion was formed and that the learned magistrate was in error in dismissing the charge. In this regard he relied upon the arguments advanced for the appellant in the matter of *DPP v Miers*.

I refer to my reasons in the matter of *DPP v Miers*. Applying the analysis there set out to the present case, it was not open to find that the respondent had the complete present personal physical control of the television set to the exclusion of the police at the time the relevant suspicion was formed. He did not have the property in his present manual control and did not have the exclusive right or power to place his hands on it, to have manual custody when he wished. At the relevant time he was in custody in the sense of informal arrest and was plainly no longer a free agent. A matter not canvassed in argument or referred to by the learned magistrate was the effect of the search warrant itself on the physical control of the property. That is a matter that may have to await consideration in a future case. I am satisfied that no error has been shown in the magistrate's decision that it was not open to find that the respondent had actual possession of the television set when the police formed the requisite suspicion.

The respondent also sought to support the learned magistrate's decision on the basis that the police evidence revealed that the flat was occupied by **[14]** at least one other person and on the evidence, possibly, three other people. It was submitted that the police case, therefore, failed to raise a *prima facie* case of complete and exclusive possession on the part of Mr Dahl as against these persons. I am not persuaded that this is so. There was evidence adduced in the police case, capable of acceptance, that Mr Dahl admitted that he lived at the premises and in fact rented them, that he had bought the television set two years before and that he had the TV there to watch it. Whether this evidence would be sufficient in the final analysis to establish complete, present and exclusive physical control beyond reasonable doubt may be debatable but it seems to me that it would not have been open to the learned magistrate to say that such evidence prevented a finding of actual possession on the part of the respondent as against the other occupants. On the evidence it would remain open to find that while others had access to the television set, it was the respondent who gave permission for that access and thus retained exclusive custody and control. The informant would have gained some comfort from the discussion in *Olholm v Clink* [1923] VicLawRp 69; [1923] VLR 556; 28 ALR 421; 44 ALT 87.

The foregoing analysis may suggest a strict approach to the provision. It must be remembered, however, that the provision involves "some drastic interference with the rights of citizens." (*Kitchen v Cox* at 330). As Hedigan J noted in that case:

> "The section is founded upon a suspicion formed in relation to goods in the actual possession of an individual who is, if the criteria are established, then obliged to give an explanation to a court in order to exculpate that person from the offence. It effectively reverses the burden of proof."

It should also be borne in mind that the typical case to which the section is addressed is that of the person not under arrest. On formation of the requisite suspicion, that person can then be arrested.

[15] Question 2: Alleged incorrect interpretation and application of *Kitchen v Cox*.

As in *DPP v Miers* it was put that the learned magistrate had incorrectly treated *Kitchen v Cox* as authority for the proposition that if a person is under arrest that person must be regarded as divested of the capacity to have actual possession in all cases. As I stated in my reasons in that decision, I accept that Hedigan J in *Kitchen v Cox* did not advance that proposition. On the affidavit material before me, I am also satisfied that the learned magistrate did not apply the decision in that way. The learned magistrate referred not only to the question of custody but to the question of whether the accused was a "free agent". The appellant also sought to argue that the learned magistrate had treated Mr Dahl as someone whose case was on all fours with that of Mr Cox. I am satisfied that he did not do so. The appellant's material notes that the learned magistrate said that his reasoning was "in line" with the decision in Cox's case. In my view his Worship was correct in so concluding. For the foregoing reasons the appeal should be dismissed.

APPEARANCES: For the DPP: Mr CT Ryan and Mr M Regan, counsel. Peter Wood, solicitor. For the respondent Dahl: Mr J Lavery, counsel. Kuek & Associates, solicitors.