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SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v ALEXANDER & KEELEY

Young CJ, Kaye and McGarvie JJ

26 June 1980 — [1981] VicRp 31; [1981] VR 277

CRIMINAL LAW – HANDLING STOLEN GOODS – STOLEN GOODS TAKEN TO A MOTEL ROOM – ACCUSED OBSERVED BY POLICE – POLICE LATER ENTERED MOTEL ROOM WHEN ACCUSED WERE ELSEWHERE – POLICE OFFICER EXAMINED CASES WHICH CONTAINED STOLEN GOODS – POLICE OFFICER LEFT GOODS IN MOTEL ROOM – ACCUSED LATER APPREHENDED AND CHARGED – WHETHER POLICE HAD TAKEN POSSESSION OF THE GOODS WHEN THEY ENTERED THE MOTEL ROOM – WHETHER GOODS WERE "RESTORED" TO THE RIGHFUL OWNER – ACCUSED CONVICTED – WHETHER COURT IN ERROR: *CRIMES ACT 1958, S90(3)*.

A quantity of goods were stolen from jeweller's shop. A police officer saw the defendant A. book into a motel a short time after the theft and observed both defendants take a box and cases from a motor car. Police maintained observance of the motel unit and later obtained a key and entered the unit where they saw a quantity of jewellery and watches. When the defendants returned to the unit they were found to be examining the articles which had been observed by police. The defendants were arrested and charged with burglary and handling stolen goods. They were acquitted of the burglary charge but convicted on the handling charge and sentenced to four years' imprisonment. Upon appeal—

HELD: Appeal dismissed.

1. **Section 90(3) of the *Crimes Act 1958* applies whenever a police officer in the course of duty takes possession or custody of stolen goods. The question was whether in this case the police officer when he entered the motel unit took possession of the goods prior to the arrival of the defendants at the motel.**

2. **The Crown had the onus of proving that the goods had not been restored to the possession of the police officer. Whilst the police officer examined the stolen goods, he did nothing which made it more difficult for those in possession of the goods to have access to them or take them away. Also, he did nothing which placed the police in a better position to control the goods. In those circumstances there was nothing to say that the police officer took possession of the stolen goods.**

THE COURT: *[After setting out the facts, the ground of appeal and s90(3) of the Crimes Act 1958, the Court continued] ... Mr Weinberg, counsel for the applicants, submitted that there was evidence that tended to show that after Hall (the police officer) entered unit 9, he or one or more of the police had custody of the goods in the room which had earlier been stolen. [The Court referred to Attorney-General's Reference (No 1 of 1974) (1974) 1 QB 744 for two matters. One was that it is inappropriate to speak of "restoring" lawful possession or custody to police who never previously had same. However, the Court was satisfied that the Section 90(3) applies whenever a police officer in the course of his duty takes possession or custody of stolen goods. The second reference was to consider a submission by Mr Willee on behalf of the Crown that the onus was on the defendants to prove that goods previously stolen had been restored to lawful possession or custody. The Court rejected that submission and placed the onus on the Crown to prove the goods had not been so restored before they were received. The Court continued] ... It is necessary to examine the evidence to see whether on the view of it most favourable to the applicants there was evidence which could possibly create a reasonable doubt whether the goods had not been restored to the lawful possession of the police. In doing that, one looks to see whether there is a credible combination of circumstances disclosed by the evidence (and reasonable inferences from the evidence) that suggests that the goods had been restored to the lawful possession of the police. If no such credible combination of circumstances is obtainable from the evidence the issue is not to be left to the jury. Compare: *Lee Chun-Chuen v R* (1963) AC 220 at 233; [1963] 1 All ER 73; [1962] 3 WLR 1461.*

We accept Mr Weinberg's submission that the goods would have ceased to be stolen goods if the police had resumed possession of them for however short a time. They would not have again become stolen goods if the police had relinquished such possession before the applicants entered the motel room on the Monday morning.

In deciding an issue whether the goods had not been restored to the possession of the police, the jury would, of course, decide an issue of fact. *Pendlebury v Kakouris* [1971] VicRp 20; (1971) VR 177 at 193-4. The ordinary test of possession stated in Pollock and Wright, *Possession in the Common Law*, p129 and approved by the High Court in *Moors v Burke* [1919] HCA 32; (1919) 26 CLR 265 at 270; 25 ALR 213 is: "had he the separate undivided and exclusive control of the thing." The question here is whether at the relevant time one or more of the police had such control of the goods. Several persons in concert may hold possession. *Moors v Burke* (above) p271. The police would have possession only if they in fact controlled or had the power to control the goods to the exclusion of other persons and if they intended to do so. *Beard v Brebner* (1962) SASR 223. Legal rights existing in relation to the goods are relevant because inferences may be drawn from them which can be used in finding the facts upon which possession depends. Pollock and Wright (above), pp10-16.

We now consider the extent to which the evidence, on the view most favourable to the applicants, could be regarded as suggesting that the police were in possession of the goods before the applicants arrival at the motel. Mr Weinberg argued that it was open to the jury to entertain reasonable doubt whether Hall had not taken possession of the stolen goods during his inspection. Before Hall entered unit 9, the goods were in the possession of the occupants of unit 9 or of someone else. Nor does it matter whether they were in the possession of the thieves or in other unlawful possession. If the police obtained possession, it was obtained without the consent of whoever possessed the goods in unit 9 before Hall's entry. A greater degree of demonstrable change of exclusive control is required to show that possession has been taken without the consent of the prior possessor than to show a consensual change of possession. Pollock and Wright (above), pp14 and 44. At any relevant time the goods were either in the possession of those who held possession before Hall's entry or else they were in the possession of the police. Pollock and Wright (above) p129.

During the night there had been no lights burning in unit 9 and Clarke had formed the view that there was no one in it. Until Hall's inspection, the police did not know whether there were in the unit any goods which would be of interest to them or whether the door was locked. Hall's evidence is the only evidence of the instruction he was given. He said that he was instructed by Clarke to go and have a look in room 9. Hall took the small black case and the light blue suitcase from the top of the wardrobe to examine their contents. Both cases contained stolen goods. He may have taken other stolen goods in his hands to examine them. He did nothing but examine the stolen goods and left them as they were. He did nothing which made it more difficult for those in possession of the goods to have access to them or to take them away.

While he was in the room he did nothing which placed the police in a better position to control the goods than they had been before. As soon as he had completed his examination he locked the door and returned the key to the office. It would be reasonable to infer that during his inspection Hall formed the belief that the goods were stolen goods and could have formed the belief that they were stolen from the Feore brothers. There is, however, nothing in the evidence to suggest that Hall ever intended to do anything but find out whether there were goods in the room which might be stolen goods. We do not consider that there is anything in the evidence to suggest that Hall took possession of the stolen goods.

Several cases were cited to the Court where conduct by an owner or the police involving the inspection of stolen goods was held to amount to the taking of possession of the goods so that a later receiving was not a receiving of stolen goods. viz: *R v Dolan* (1955) 6 Cox CC 449; *R v Schmidt* (1866) LR 1 CCR 15; *R v Hancock & Baker* (1878) 14 Cox CC 119; *R v Villensky* (1892) 2 QB 597. In *Villensky's case*, Pollock B, said:

"The decisions in *R v Dolan* Dears 436 and *R v Schmidt* Law Rep 1 CC 15 are, in my judgement, founded on law and on solid good sense and they should not be frittered away. It is, of course frequently the case that when it is found that a person has stolen property he is watched: but the owner of the property, if he wishes to catch the receiver, does not resume possession of the stolen goods; here the owners have done so, and the result is that the conviction must be quashed."

[Ed note: The Court then referred to cases where it had been held that possession had not reverted to the property owner, viz: *R v Petch* (1878) 14 Cox CC 116; *R v Boyce* (1976) 15 SASR 40; *R v King* (1938) 2 All ER 662. The Court also commented:

"The police would be in possession however, if, while intending to exercise present exclusive control over the goods, they were, relatively to other persons the ones most able to do so. See for example: *Williams v Douglas* [1949] HCA 40; 78 CLR 521; [1950] ALR 223 and *Beard v Brebner* (1962) SASR 223. On the other hand, if they had the present physical capacity to take exclusive control of the goods but their intention was to do so only when certain future events occurred, that would not amount to possession. *R v Boyce* (1976) 15 SASR 40."]
