04/75

SUPREME COURT OF VICTORIA

O'LOUGHLIN v TRACY

Pape J

3 May 1974

CRIMINAL LAW – THEFT – PROOF OF OWNERSHIP OF PROPERTY – PROPERTY OF PERSON UNKNOWN.

The defendant was charged with stealing petrol the property of a person unknown. Admissions by the defendant were given in evidence by the tendering of his statement which detailed his part in the 'milking' of a truck. The statement concluded: "No person gave us permission to take the petrol from the truck." The informant gave evidence that inquiries as to the owner of the petrol revealed that the truck was bearing incorrect number plates.

The defendant gave no evidence. No submission was made by the solicitor appearing for the defendant and the case was closed. The presiding Justices then said that the informant had failed to prove his case as no evidence of ownership of the petrol alleged to have been stolen had been produced. The prosecuting officer then said that the prosecution relied upon *McKay v R* [1935] HCA 70; (1935) 54 CLR 1; [1935] ALR 484. The Justices then retired and on returning said that the case of *R v Isaacs* (1884) 5 NSWLR 369 and *Trainer v R* [1906] HCA 50; (1906) 4 CLR 126; 8 ALR 53 as stated in Bourke's *Criminal Law* 2nd edn, p196 decided that to be convicted of larceny there must be proof of ownership, and they dismissed the information. Upon order nisi to review—

HELD: Order absolute. Remitted to the Magistrates' Court for hearing and determination according to law.

1. It is clear law that the defendant's admission, on being properly proved, as was done here, was sufficient to justify a conviction for the explicit admission raised 'a vehement presumption of the prisoner's guilt'. Also, on a charge of receiving goods knowing them to have been stolen admissions by the accused that the goods were stolen were sufficient to justify a conviction. Here there was evidence which would have justified a finding that the owner of the petrol was unknown both by reason of the circumstances as detailed in the statement signed by the defendant and in the evidence of the police that the truck bore incorrect registration plates.

***McKay v R* [1935] HCA 70; (1935) 54 CLR 1; [1935] ALR 484; and**
***R v Gibbons* [1971] VicRp 8; [1971] VR 79, applied.**

2. Accordingly, the Justices were wrong in dismissing the information; they should have convicted him.

PAPE J: It is to be observed that the information charged the defendant with stealing petrol the property of a person unknown. Such a charge is plainly valid and has been used since very early days. In Vol. 1 Hale's P.C. 512 it is said that 'felony may be committed on stealing goods though the owner is not known and they may be described in the indictment as the goods of a person to the jurors unknown'. It is also said in Vol. 2 of Hale's book at p290 that 'in prosecutions for stealing goods of a person unknown some proof must be given sufficient to raise a reasonable presumption that the taking was felonious or *invito domino*.' In Vol 2 of East's P.C. in a passage which was cited by Griffith CJ in *Trainer's case* at p651 it is said that:

> 'With respect to things which are the regular subjects of property, felony may be committed in stealing them, though the owner be not known; for the guilt of the thief is the same. And he may be charged in the indictment with having stolen the goods of a person to the jurors unknown; or with having received goods stolen by a person unknown. And in such case the King shall have the goods. But if the owner be really known an indictment alleging the goods to be the property of a person unknown would be improper: in that case the prisoner must be discharged of that indictment, and tried upon a new one for stealing the goods of the owner by name. And in prosecutions for stealing the goods of a person unknown, some proof must be given sufficient to raise a reasonable presumption that the taking was felonious or *invito domino*; for it is not enough that the prisoner is unable to give a good account how he came by the goods.'

See also Roscoe's *Criminal Evidence* 16th Ed. p696.

The first of the cases relied on by the Justices was *R v Isaacs*, and there the prisoner was charged on two counts, the first that he stole certain trunks and pairs of boots the property of George Turner and others, the second that he received the same property knowing it to have been stolen. The Court held the evidence adduced to show that the goods were the property of George Turner was insufficient to prove ownership in him, and that as the evidence did not support the indictment the conviction should be quashed, The Chief Justice, Sir James Martin, said at page 372:

> 'It has always been the law, and is one of the things essential in cases of larceny, that the ownership of the property stolen should be proved. If, at the trial, it were shown that the goods stolen were the goods of A., instead of being the goods of B, as charged, an amendment of the information could be made. But here no such amendment was applied for. The prisoner was found guilty of receiving the goods, knowing them to be stolen, and that being so, the question is whether there ought to have been a conviction, there being no proof whatever as to whom the goods belonged. An information charging the owner with receiving goods the property of some person to the Attorney-General unknown, would have sufficed; but it would not have sufficed if it turned out that the owner was known. It is an essential thing to show that they were either the property of a person unknown, or of some person named. The ownership, however, was not proved here.'

And that simply meant because the ownership had been laid in George Turner and had not been proved, then the indictment had not been supported by the evidence and the accused was entitled to be acquitted. That case has no relevance to this case because here the information alleged that the petrol was the property of a person unknown, and the evidence of Detective Senior Constable Fleming established, *prima facie* at any rate, that the owner was unknown – unknown to the informant, for he said that the truck bore incorrect registration plates.

In the second case upon which the Justices relied, namely *Trainer v R*, the prisoner was tried on an indictment which charged her with stealing and receiving three lambs, the property of a person unknown. The only evidence relied upon to show that the lambs had been stolen was that when questioned she gave an untrue account of how they came to be in possession. She was convicted of receiving. The High Court allowed the appeal against this conviction on the ground that before the doctrine of recent possession could be relied upon to prove either the larceny or the receiving of the lambs there must be evidence that they were in fact stolen, and that until that is proved no inference against the prisoner could be drawn from her untrue account of how she came to be possessed of them. At page 135 of the report, Griffith CJ said this:

> 'The law of England, and it is the same he re, requires the ownership of the property to be laid in the indictment and proved. There is ample power of amendment, but in the absence of amendment it is to be proved as laid. If the name of the person is not known, and he is dead or gone, and the stealing is proved, then the charge may be laid as stealing from a person unknown. But, if it is not known whether the goods were stolen or not, you cannot get over the difficulty by saying the goods were stolen from a person unknown.'

At page 139, O'Connor J referred to the case of *Isaacs*, and said this;

> 'If the position taken up by the Crown here is to be established, it can only be upon the ground that, whenever a person is found in the possession of property of which he gives a false or inconsistent account, he may be convicted of stealing it; in other words, wherever a person is found in possession of property not shown to have been stolen, and either speaks or acts as a person would who had stolen it, he may be convicted of larceny. There is no warrant for any such statement of the law. All the authorities lay down the law in the same way, namely, that the first necessity in applying the law of presumption from recent possession is that there must be evidence to go to the jury that the goods were stolen.'

Trainer's case, so far from supporting the decision of the Justices, really demonstrates that they were wrong in dismissing the information, for in this case, unlike *Trainer's case*, there was ample evidence that the defendant had stolen the petrol. That evidence is to be found in his own signed statement in which he unequivocally admits taking the petrol from a truck which was not his property in circumstances which made his act a larceny in law. In view of his admissions, there of course was no need for the prosecution to rely on the doctrine of recent possession as was done in *Trainer's case*. It is clear law that his admission, on being properly proved, as was done here, is sufficient to justify a conviction (see *McKay v R* [1935] HCA 70; (1935) 54 CLR 1; [1935] ALR 484) for to use the words of Dixon J at p10, the explicit admission raised 'a vehement

presumption of the prisoner's guilt.'See also *R v Gibbons* [1971] VicRp 8; [1971] VR 79, where the Full Court held that on a charge of receiving goods knowing them to have been stolen admissions by the accused that the goods were stolen are sufficient to justify a conviction. Here there was evidence which would justify a finding that the owner of the petrol was unknown both by reason of the circumstances as detailed in the statement signed by the defendant and in the evidence of the police that the truck bore incorrect registration plates, and in my view the Justices were wrong in dismissing the information; they should have convicted him.
