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SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v BELJAJEV

Starke, Murphy and Hampel JJ

14 May 1984 — [1984] VicRp 57; [1984] VR 657; (1984) 12 A Crim R 430

CRIMINAL LAW – HANDLING STOLEN GOODS – DOCTRINE OF RECENT POSSESSION – INNOCENT EXPLANATION BY ACCUSED – WHETHER ANSWERS DOCTRINE OF RECENT POSSESSION – USE OF STATEMENTS BEFORE AND AFTER CAUTION GIVEN – PRINCIPLES WHICH APPLY TO SUCH USE.

STARKE J: *[After setting out the facts, the grounds of appeal, aspects of the evidence given at the trial and parts of the transcript of the direction given to the jury by the learned trial judge, His Honour continued]:* ... **[9]** The principles which I think apply to the use that can be made of statements before and after a caution being given have been laid down in a series of cases by the High Court, and the propositions I propose to enunciate I believe are in conformity with the decisions of the High Court. I am assisted in coming to the conclusions I have come to by the fact that the prosecutor was unable to advance arguments as to why this Court should not hold that the learned Judge's charge, which I have already read in respect of this matter, was defective. The propositions are these.

(a) Any untrue statement or false denial made before or after a caution is given can be used to show a consciousness of guilt and can be used as to the credit of the applicant if he subsequently gives an innocent explanation at his trial or before trial.

(b) Any failure to give an innocent explanation when the situation reasonably calls for it before the caution can be used as to the credit of any subsequent innocent explanation which he makes at his trial or before trial.

[10] (c) No failure to give an innocent explanation after caution can be used as to the applicant's credit or otherwise, and the jury must be so directed.

(d) In my opinion, the concept of selectivity does nothing more than confuse the issue in this case. I think it is clear – and the case of *Woon v R* [1964] HCA 23; (1964) 109 CLR 529; [1964] ALR 868; 38 ALJR 32 is in point – that selective answers made before or after caution can be used to show a consciousness of guilt and can be used no doubt as to the credit of a subsequent innocent explanation if the answer can be clearly and reasonably construed as showing a consciousness of guilt. Here, whilst it is clear that the applicant did answer some questions and so to this extent was selective but it does seem that the questions he answered were questions which either were known to the police or could obviously have been ascertained by them. It is not suggested that any of the answers were untrue, and accordingly, in my opinion, could not have been used by the jury either to show a consciousness of guilt or to undermine the credit of the innocent explanation which he subsequently made in his unsworn statement from the dock.

(e) The failure to give an immediate innocent explanation is not a matter exclusive to cases of recent possession, but subject to the right to silence, applies to all cases where an innocent explanation may be reasonably expected. In my opinion, the right to silence is a fundamental principle of the criminal law and is not to be overridden by any other so-called doctrine or other principle.

Accordingly, in this case, in my opinion, as the learned Judge, far from so directing the jury, left his failure to explain after the caution was given to the jury **[11]** for their consideration of whether the explanation he gave from the dock was or was not to be accepted. That, so it seems to me, is a fundamental error which vitiates the trial and the conviction and I would allow the application on this ground. Where the sole question to be decided was whether or not the applicant could call in aid his innocent explanation in answer to the doctrine of recent possession, an

error of that kind, in my opinion, clearly cannot be saved by the proviso, and indeed the learned prosecutor made no such submission. That is the basis of my decision in this application. But there were other matters which, had I not come to a confident conclusion in regard to that matter, would have merited a serious consideration. Firstly, nowhere in his charge did the learned Judge give the jury any assistance as to what the word "recent" means in the context of this so-called doctrine. All he told them was in various ways that where someone is found to be in possession of goods recently stolen, and the other ingredients were present, then they could convict.

It is in my opinion necessary in each case where this doctrine is relied upon to tell the jury what the word "recent" means in this context, and that they should have regard to the nature of the goods alleged to be stolen or received and the general circumstances of each case, and it is for them in the long run to determine whether the goods were or were not recently stolen in the light of that direction. Here the learned Judge, it seems to me, assumed that the goods were recently stolen or received and in effect withdrew that issue **[12]** from the jury's consideration. Whether that misdirection or non-direction vitiated the trial would have to be determined in the light of the context of the rest of the charge, and I say no more about it.

Nextly, the learned Judge said this, at p567:

> "Well now, members of the jury, the accused man gave an explanation to you in his statement and if you accept that, it is then put there is an explanation that shows he lawfully obtained those goods."

This appears to me to incorrectly place the burden on the applicant to persuade the jury that they should accept his explanation. That as I understand it is not the law. The law is that if the jury find that the explanation might reasonably be true, even if they do not believe it, then that is a sufficient basis for an acquittal. Whether when read in the light of the context of the rest of the charge this direction vitiated the trial I do not pause to determine.

Finally, at p 524 the learned Judge said this:

> "Now, in that situation if the person says nothing – he just says, 'Well, they are my watches and that is all I am going to say', there is this presumption if you want to call it that, or inference that says if a person is found in possession of property which has been recently stolen and he gives no explanation for how he got the property or he gives a lying explanation, then a jury is entitled to conclude that he either stole the jewellery or he received it knowing it was stolen, and in some cases if the person is found in possession five minutes after the robbery or half an hour after the robbery, the jury would be asked to conclude that he was the thief."

In *Biason's case*, (unrep, Sup Crt, CCA, 22 June 1983) the Court said this at pp5-6:

> "By way of introduction perhaps I should make a preliminary observation. In the older cases dealing with recent possession apparently the doctrine was often treated as being based on a legal presumption. However, whether the decision of the House of Lords in *Woolmington's case* in 1935 changed the thrust of **[13]** legal opinion in respect of this matter or whether it was merely coincidental, I think it is undoubtedly settled law now that there is no question of a legal presumption in respect of the doctrine of recent possession. The present law is, in my opinion, that the so-called doctrine is no more than an application of the rules of the law of evidence to the rules relating to circumstantial evidence. In other words, the so-called doctrine is merely an application of a rule of evidence, the question always being whether the jury are prepared to infer from the fact that property recently stolen is found in the possession of a suspected person and having regard to his explanation they are prepared to convict. However, because the expression [that is the expression, the doctrine of recent possession] is well understood in the law, I will continue to use it for present purposes."

Again I note that the learned Judge in the passage I have read referred to an inference as an alternative to a presumption, and it may well be that if this matter stood alone it would not be sufficient to vitiate the trial. However, in my opinion the application should be granted.

MURPHY J: I agree that the application should be allowed. **HAMPEL J:** I also agree and have nothing further to add.

Solicitor for the applicant: Legal Aid Commission.
Solicitor for the Crown: JM Buckley, Solicitor to the Director of Public Prosecutions.