12/96

SUPREME COURT OF VICTORIA

DE BONO v NEILSEN

Coldrey J

30 January, 7 February 1996 — (1996) 88 A Crim R 46

CRIMINAL LAW – HANDLING STOLEN GOODS – ELEMENTS OF OFFENCE – WHETHER CROWN REQUIRED TO PROVE "OTHERWISE THAN IN THE COURSE OF STEALING" – GUILTY INTENT – WHETHER AT THE TIME OF RECEIVING – WITNESS REFRESHING MEMORY – WHETHER STATEMENT MUST BE PUT IN EVIDENCE: *CRIMES ACT* 1958, S88; *EVIDENCE ACT* 1958, S36.

1. Where a charge of handling stolen goods is laid, it is incumbent on the prosecution to prove all the elements of the charge including that the handling occurred "otherwise than in the course of stealing".
***R v Bruce* [1988] VicRp 62; (1988) VR 579; and**
***Gilson v R* [1991] HCA 24; (1991) 172 CLR 353; 100 ALR 729; 53 A Crim R 344; 65 ALJR 416, followed.**

2. The prosecution must prove the guilty intent of the receiver at the time of the receipt of the goods. The onset of any subsequent knowledge or belief on the defendant's part that the goods previously received are stolen, does not create an offence of receiving.
***R v Smythe* (1981) 72 Cr App R 8; and**
***R v Cottrell* [1983] VicRp 11; (1983) 1 VR 143, referred to.**

3. Where a witness has refreshed memory from a statement in the witness box or outside court prior to giving evidence, the witness's statement cannot be put in evidence unless there is cross-examination as to the statement's contents which goes further than the facts used by the witness to refresh memory.
***R v Harrison* [1966] VicRp 12; (1966) VR 72, followed.**

COLDREY J: [1] This is an appeal pursuant to s92 of the *Magistrates' Court Act 1989* from the order of the Magistrates' Court at Broadmeadows on 27 September 1995 convicting Stephen De Bono (the appellant) of the charge of handling stolen goods. The appellant was fined $500 and released on a six months Community Based Order to perform 100 hours unpaid community work. A further order was made for the return of the stolen goods to their designated owner.

The charge against the appellant was originally couched in these terms:

> "The defendant at Sunshine on 13-7-1994 did dishonestly handle stolen goods, namely a 1978 Holden HZ Premier Sedan belonging to Michael Scott Hutton, knowing or believing the same to be stolen goods ..."

At the commencement of the hearing a successful application was made to amend the description of the stolen goods to read:

> "A 1978 Holden HZ Premier car body belonging to Michael Scott Hutton including the interior trim, all body panels and fittings but excluding the seat, the suspension of brakes, the chassis, the engine and the drive train."

The relevant section in the *Crimes Act* 1958 is s88, which reads:

> "(1) A person handles stolen goods if (otherwise than in the course of the stealing) knowing or **[2]** believing them to be stolen goods he dishonestly receives the goods ..."

There are other forms of the offence of handling set out in this section but none are pertinent to this appeal. The facts giving rise to the alleged offence are contained in the affidavit of the appellant sworn 17 October 1995 and the exhibits thereto. The appellant's account of the Magistrates' Court proceedings is unchallenged by any answering affidavit. The appellant consented to the charge of handling being heard summarily and pleaded not guilty to it.

According to the appellant's affidavit Mr Michael Hutton gave evidence that in August 1992 he was the owner of a 1978 HZ Holden registered No. ATW448. That vehicle was stolen on a night in August 1992. Subsequently on Monday 18 July 1994 he inspected an HZ Premier Holden at the Williamstown Police Station which he identified as belonging to him (or at least those portions of the vehicle referred to in the amended charge). A witness, Mr Jason Mark Brown, told the Court that he had been the owner of an HZ Holden Sedan registration DHJ753 which he had sold to the appellant. He deposed to having purchased the vehicle one and a half to two years earlier from a Mr Christopher Blease. The affidavit contains no evidence of the date of the sale of the vehicle to the appellant although, in a record of interview conducted between the appellant and investigating police on 13 July 1994, the appellant refers to a receipt from Mr Brown dated 10 December 1992, being the date of purchase of the vehicle. In the record of interview the appellant referred to undertaking the extensive re-vamping of **[3]** that vehicle with spare parts purchased over time from a variety of sources.

Mr Brown stated in essence that, having been shown photographs of the motor vehicle on 27 July 1994 he believed they depicted a different vehicle to that which he had sold to the appellant or alternatively the vehicle depicted was the same vehicle having had extensive work done to it. One significant change, for example, was that the vehicle sold to the appellant had manual transmission whereas the one inspected was equipped with automatic transmission. Mr Blease confirmed the sale of the vehicle to Mr Brown. The thrust of his evidence appears to be that, on inspecting the vehicle in possession of the police at the Williamstown Police Station on 12 August 1994 he observed no characteristics of the vehicle that he had sold to Mr Brown.

The evidence of Senior Constable Rodney Burridge, who was a motor vehicle examiner with the State Forensic Science Centre related to an examination of the vehicle with registration No. DHJ753 on 12 December 1994. He expressed the view that the automatic transmission linkages on the vehicle had not been disturbed, and further, that there was no sign of the vehicle ever having had a clutch pedal installed in it. These matters were of some significance since the appellant claimed, in his record of interview, to have installed the automatic transmission in the vehicle which he had purchased from Mr Brown.

It is not necessary to summarise the balance of the evidence save to note that no specific admissions were made by the appellant in the record of interview although, (as was conceded by counsel for the appellant), depending on the view **[4]** one took as to the identity of the vehicle in the possession of the appellant when intercepted by the police on 13 July 1994, there may arguably have been false denials in the interview evincing a consciousness of guilt. That matter was not argued before me and I venture no view upon it.

Counsel for the appellant submitted to the Magistrate that there was no case to answer, principally on the basis that the prosecution had failed to prove an element of the offence, namely that the appellant had come into possession of Mr Hutton's car (assuming that to have occurred) "other than in the course of stealing". In other words it was submitted that, at its highest, the evidence before the Court was equally consistent with the appellant being a thief or a handler or a person in possession of goods recently suspected of being stolen or unlawfully obtained. Accordingly, the charge of handling had not been made out and should be dismissed. In support of that submission counsel referred to *R v Bruce* [1988] VicRp 62; [1988] VR 579 and *Gilson v R* [1991] HCA 24; (1991) 172 CLR 353; 100 ALR 729; 53 A Crim R 344; 65 ALJR 416. In response to this submission the Magistrate, purporting to rely on the case of *R v Koene* [1982] VicRp 92; [1982] VR 916; (1981) 5 A Crim R 18, ruled that the prosecution was not required to prove that the handling had been "other than in the course of the stealing".

No evidence was called on behalf of the defence and the appellant's counsel reiterated his original submission as well as arguing that there was no evidence, as alleged in the charge, that the goods had been received by the appellant on 13 July 1994, or that the relevant *mens rea*, namely the knowledge or belief that the goods were stolen, was formed on that date. Nor was it sufficient to found a charge of receiving that, from **[5]** the goods having been received honestly prior to 13 July 1994 the appellant later obtained a state of knowledge or belief that they had been stolen.

The hearing, which took place on 1 and 4 September 1995, was adjourned until 27

September 1995 whilst the Magistrate took time to consider her decision. On that date the prosecutor made an application to amend the charge to allege handling between the dates of 19 August 1992, (apparently the date of the theft of the vehicle) and 13 July 1994. The amendment was objected to by the appellant's counsel on the basis that it would substantially alter the charge faced by his client and the manner in which the defence had been conducted. The Magistrate refused leave to amend.

I might interpolate that, it seems to me such an amendment ought to have been made. Since it would do no more than reflect the factual reality of the case presented by the prosecution it is hard to see how it could have prejudiced the defence save to the extent that the defence sought to benefit from a technical misunderstanding of the law by the person originally formulating the charge. On any view of the facts the stolen goods were not received on 13 July 1994. In the event the matter was not the subject of argument before this Court and, consequently, I say no more about it.

An associated matter raised in discussion between counsel for the appellant and the Magistrate after the charge had been found proven, was whether any finding was made by the Magistrate as to the date of the receipt by the appellant of the stolen goods and whether, at the time of such receipt the appellant had the knowledge or belief that the goods were stolen. **[6]** According to the affidavit material the Magistrate indicated an inability to determine either matter but asserted that, by analogy with the concept of theft by finding, handling could be constituted by the attainment of knowledge or belief that goods were stolen at a time subsequent to their having been received.

The gist of the Magistrate's decision was that the fact that the appellant had been in possession of the stolen goods on 13 July 1994 was sufficient to establish the *actus reus* in respect of both the receipt of the stolen goods and knowledge or belief that they were stolen. In arriving at that conclusion the Magistrate found that the vehicle in the appellant's possession was part of the vehicle stolen from Mr Hutton and that the defendant's explanation in the record of interview of having undertaken extensive restoration of the vehicle purchased from Mr Brown was elaborate and false and demonstrated a consciousness of guilt. The Magistrate ruled, in accordance with her perception of the cases of *R v Koene (ibid)* and *R v Pitham & Hehl* (1977) 65 Cr App R 45 that the prosecution was not required to prove the receiving was "other than in the course of stealing" but rather this was a defence to be raised and established by a defendant.

The appellant challenged the conviction on a number of grounds and the principal questions of law formulated for decision in this appeal were as follows:

> "Did the Magistrate err in law in ruling that the element of the charge under Section 88 of the *Crimes Act* '(otherwise than in the course of stealing)' is not an element of the charge to be proved by the prosecution?
>
> **[7]** Did the learned Magistrate err in law in concluding that a Defendant charged with receiving stolen goods knowing or believing them to be stolen is guilty where he does not have the requisite 'mens rea' at the time of receiving the goods but becomes aware of them being stolen goods at some stage after receiving them?"

Before this Court Mr Lavery, who appeared on behalf of the appellant, dealt with the first question by reiterating the submission advanced before the Magistrate that where the single charge laid was one of handling, an element to be proved by the prosecution was that such handling was "otherwise than in the course of the stealing". In response Mr Dewberry, who appeared on behalf of the respondent argued that the phrase in question was inserted merely to distinguish an act of theft from an act of handling, both of which, it was submitted, could be committed by the same person in relation to the same property. Thus there could theoretically be a conviction for both theft and handling of the same property. He proffered the example of an initial theft followed by activity later in time designed to disguise the item stolen. It was submitted that it was a question of degree where the line was drawn in any case.

It was put by both counsel that this case was one involving the concept of recent possession. That concept, which is, of course, a species of circumstantial evidence, is relevant to both theft and handling of stolen goods. However given the sequence of events revealed on the material

before me, namely the theft of Mr Hutton's vehicle in August 1992, the purchase of the vehicle from Mr Brown about four months later in December 1992 and its subsequent reconstruction, one may question the application of this concept to the instant case.

[8] What constitutes recent possession will of course depend on the nature of the goods stolen or received and the general circumstances of each case (see for example *R v Beljajev* [1984] VicRp 57; [1984] VR 657 at 663; (1984) 12 A Crim R 430). Again the matter was not the subject of argument by counsel. I do not think the proposition for which Mr Dewberry contended is sustainable. In *R v Seymour* (1954) 1 All ER 1006 the Court of Criminal Appeal reiterated the proposition that "a man cannot receive from himself". The subsequent legislative formulation of the offence of handling in the *Crimes (Theft) Act 1973* has not altered that legal situation where it relates to the act of receiving. In *R v Koene* (*ibid)* the question of whether, on a charge of receiving, the Crown was required to establish beyond reasonable doubt that the goods were handled "otherwise than in the course of the stealing" was canvassed. The matter was not finally resolved since it was not raised on the facts in that case. However, in the course of his judgment Lush J remarked:

> "In my opinion the words, 'otherwise than in the course of the stealing' provide a defence to a charge laid under the section. It may well be, but I do not decide, that the Crown carries the onus of displacing this defence. It is not, however, necessary for the trial judge to direct the jury on the issue unless the evidence in the case raises the question on which the issue turns."

In *R v Cottrell* [1983] VicRp 11; [1983] 1 VR 143 Newton J (with whom the other members of the Full Court agreed), referred with approval to the Judge's charge at a trial in which counts of stealing and receiving were laid in the alternative. The trial judge had instructed the jury (148):

> "Now as far as these alternative counts of receiving are concerned that have been made against Mr Cottrell, the Crown in each instance must prove Mr **[9]** Cottrell otherwise than in the course of stealing knowing or believing the car parts concerned in the particular count you are considering to be stolen goods dishonestly received them into his possession."

In *R v Bruce* (*supra*) Gray J in delivering a judgment in which the other members of the Full Court agreed remarked (599):

> "Although it has long been accepted that one of the elements of receiving is that the accused received the property from another, it is possible that this element was once treated as something which did not require proof by the prosecution, but which it was open to the accused to negative. But I have been unable to find a reference to any such analysis. If it were so, it may lend some support to an argument that the words 'otherwise than in the course of stealing' in s88(1) of the *Crimes Act* are in the nature of an exception into which the accused may bring himself if he can. But, in my opinion, such an argument cannot be sustained in the context of the modern criminal law."

The High Court refused special leave to appeal in that case. However, in *Gilson v R (ibid)* the High Court sought to solve the dilemma raised when a jury faced with alternative counts of stealing and receiving stolen goods are satisfied beyond reasonable doubt that the accused is either the thief or receiver. That particular problem (which is not this case) was, according to the majority (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ) to be solved by convicting the accused of the less serious offence which was to be identified by the trial judge. In the course of the majority judgment of Mason CJ, Deane, Dawson and Toohey JJ it was accepted (at p360) that the offences of stealing and receiving were mutually exclusive.

Since this be so it would appear to follow that, if only one charge is laid, (here the charge of receiving), it is incumbent upon the prosecution to prove all the elements of that **[10]** charge which must involve proof that the acts of the defendant constituted receiving and not theft. On this aspect of the matter it is my view that the observations of the Full Court in *R v Bruce* were correct. A similar approach is taken in the South Australian cases of *Ghys v Crafter* (1934) SASR 28 and *R v Dawson* (1964) SASR 256. The English commentator Professor JC Smith expressed the same opinion in *The Law of Theft* 2nd ed 1972 para478.

In the course of argument Mr Lavery sought to bolster his submission by reference to s73(4) and (14) of the *Crimes Act* which relate respectively to such matters as larceny by finding or illegal user of a motor car where, in the latter instance, there is, in effect, a deemed theft. Since

any argument based on these subsections was not addressed to the Magistrate I do not propose to consider their application, if any, to the present situation.

From what I have said, it is clear that I regard the Magistrate as being in error in concluding that the prosecution did not have to prove as an element of the offence of receiving, that it occurred "otherwise than in the course of the stealing". Whether that inference can ultimately be drawn is a matter for the Magistrate to determine after evaluating all the evidence before the Court. In relation to the question of the requisite *mens rea* Mr Lavery submitted that the *mens rea*, namely the knowledge or belief that the goods are stolen, must coincide with the time the defendant received the goods. In support of that proposition he referred to *Property Offences* by CR Williams and MS Weinberg (2nd edn 1986 p386).

[11] Mr Dewberry in response appeared to opt for the proposition that the mens rea did not need to coincide with the actual receipt of stolen goods, supporting the larceny by finding analogy drawn by the Magistrate. Alternatively it was put that there was ample evidence for the finding by the Magistrate of a coincidence between the actual receipt of the stolen property and the mens rea on the facts of this case. In discussing the English equivalent of the relevant portion of s88 of the *Crimes Act* the English Court of Appeal in *R v Smythe* (1981) 72 Cr App R 8, had this to say (at p13):

> "The generic terminology of handling was subdivided and particularised into two alternative versions, one, receiving, and two, assisting the thief in pursuance of the theft. In the instant case the prosecution elected to proceed upon the limb of receiving. Now the word 'receive' itself indicates a single, finite activity. Before the *Theft Act* 1968 the word 'receive' was regarded as such and the essential characteristic of the offence was guilty knowledge of the receiver at the moment of receipt.
>
> It seems to us that Parliament, in re-introducing the concept of receiving as a particular form of handling, must have intended to carry over the previous well-established concept of a single finite act."

In *Cottrell's Case (ibid)* the Full Court approved that part of the trial judge's charge which stated:

> "The Crown must prove that he took possession of the goods ... having, at that time, the state of mind mentioned."

This view was also taken by Professor JC Smith in *The Law of Theft (ibid)* para484. In my view the current state of the law is as set out above. Consequently the onset of any subsequent knowledge or belief on the part of a defendant that goods previously received by him had been stolen, does not create an offence of receiving. **[12]** In the circumstances the analogy drawn by the Magistrate with larceny by finding is inappropriate.

Accordingly the Magistrate was in error in ruling that the requisite *mens rea* did not have to exist at the time of the receipt of the stolen goods. It may well be that an examination of the evidence would lead the Magistrate to draw an inference from all the circumstances of the case, including the explanation proffered by the appellant in the record of interview, that at the time of the receipt of the stolen vehicle parts the appellant must have known or believed them to have been stolen. Whilst the Magistrate, according to the affidavit, professed an inability to make a finding of fact as to whether knowledge of the goods being stolen existed at the time of receipt of them, no specific argument appears to have been addressed by the parties on this point. If, having heard submissions on the matter, the Magistrate was confirmed in the views expressed in a discussion which appears to have followed the decision in this matter, then the appellant could not be convicted of the receiving charge.

A further question of law requiring consideration was:

> "Did the learned Magistrate err in admitting into evidence a copy of the statement of Mr Hutton in circumstances where the witness was being cross-examined on that statement after he had admitted reading the Statement before Court with a view to refreshing his memory from the statement, either of her own motion or otherwise?"

In the course of the cross-examination of Mr Hutton that witness agreed that he had read through his statement to police prior to giving his evidence on 1 September 1995 for the purpose of refreshing his memory. Cross-examination was then addressed to the omission from

his statement of any account of **[13]** opening the boot of the vehicle at the Williamstown Police Station with a key he had in his possession and as to his resiling into uncertainty from an allegation in his statement that he thought the vehicle that he had owned had been fitted with a turbo 400 transmission. According to the affidavit material the Magistrate at this point called for the statement (which apparently had not been produced to the witness) and required its tender pursuant to s36 of the *Evidence Act.* Section 36 of the *Evidence Act* is in the following terms:

> "A witness may be cross-examined as to previous statements made by him in writing or reduced into writing relative to the subject-matter of the cause or prosecution without such writing being shown to him. But if it is intended to contradict such witness by the writing, his attention must before such contradictory proof can be given be called to those parts of the writing which are to be used for the purpose of so contradicting him:
>
> Provided always that it shall be competent for the court at any time during the trial or inquiry to require the production of the writing for inspection and the Court may thereupon make such use of it for the purposes of the trial or inquiry as the court thinks fit."

The principles relating to the operation of this section are set out in *Cross on Evidence* (4th Australian edn. 1991 paras.17540-17545).

Counsel for the appellant submitted that, since the document had been used by the witness to refresh his memory, cross-examination upon it was permissible without such document being admitted into evidence.

In supporting the action of the Magistrate, Mr Dewberry sought to rely on the words of the proviso in the section which, he submitted, were broad enough to encompass what had occurred.

[14] In my view s36 of the *Evidence Act* is directed to quite a different situation to that which occurred in the present case. Here the witness was being cross-examined about a statement made by him which he had utilised for the purposes of refreshing his memory. The general principles applicable to such a document are conveniently set out in *R v Harrison* [1966] VicRp 12; [1966] VR 72. It is sufficient to refer to the headnote:

> "... A document which is used by a witness for the purpose of refreshing his memory cannot be put in evidence by counsel calling the witness unless there is cross-examination as to the contents of the document which goes further than the facts which are used by the witness for the purpose of refreshing his memory. ....
> *Walker v Walker* [1937] HCA 44; (1937) 57 CLR 630, and *Senat v Senat* [1965] 2 All ER 505; [1965] P 172; (1965) 2 WLR 981 ... applied."

These principles would appear to be applicable whether the witness has refreshed his memory from the statement in the witness box or outside the Court prior to giving evidence (see *R v Pachonick* [1973] 2 NSWLR 86).

In any event it is difficult to discern any justification on the materials for the Magistrate requiring the tender of Mr Hutton's statement. It was conceded by counsel for the appellant that the only conceivable prejudice to his client in the circumstances could have been the possession by the Magistrate of the witness's written statement when all of the other evidence was given *viva voce*. Even allowing that the Magistrate was in error, the admission of this statement into evidence would not, in my view, constitute a sufficient ground for quashing the conviction.

In the result, the Magistrate having applied the wrong principles to the evidentiary material the appeal must be **[15]** allowed and the orders of the Magistrates' Court set aside. The matter will be remitted to the Magistrates' Court at Broadmeadows for determination according to the law.

APPEARANCES: For the Appellant: Mr J Lavery, counsel. Tony Danos, Solicitors. For the Respondent: Mr S Dewberry, counsel. Solicitor to the Office of Public Prosecutions.
