

29/04; [2004] VSC 427

## SUPREME COURT OF VICTORIA

### ***DPP v SWEETON***

Balmford J

14, 29 October 2004

**CRIMINAL LAW – POSSESSION OF PROCEEDS OF CRIME – ITEMS OF PROPERTY FOUND BY POLICE OFFICERS IN GARAGE – WHEN ITEMS FOUND POLICE OFFICER HAD CERTAIN SUSPICIONS – CHARGE DISMISSED – MAGISTRATE NOT SATISFIED THAT THE PROPERTY WAS IN THE POSSESSION OF THE DEFENDANT WHEN THE SUSPICION WAS FORMED – MEANING OF "POSSESS" - WHETHER MAGISTRATE IN ERROR: CONFISCATION ACT 1997, S123(1).**

Section 123(1) of the *Confiscation Act* 1997 ('Act') provides:

(1) A person must not receive, possess, conceal, dispose of or bring into Victoria any money, or other property that may reasonably be suspected of being proceeds of crime.

Police officers attended a unit where they arrested the defendant S. Upon request S. unlocked the garage whereupon the officers found certain items of property. S. was later charged with the offence of possession of proceeds of crime contrary to s123 of the Act. At the hearing the matter was argued on the basis that the offence required possession at the time of formation of the suspicion and that the sole issue before the court was whether the property was in the possession of S. when the suspicion was formed. The magistrate dismissed the charge. Upon appeal—

**HELD: Appeal allowed.**

**For the purposes of s123 of the Act the possession of the goods, and the suspicion that they are the proceeds of crime, are not required to be contemporaneous. The words “that may reasonably be suspected” leave the objective question as to whether the goods may reasonably be suspected of being the proceeds of crime for determination by the court trying the accused. Thus in a prosecution under s123 no question arises as to the contemporaneity of the possession and the suspicion. Accordingly the authorities in relation to s26 of the *Summary Offences Act* 1966 are not necessarily relevant to a matter arising under s123 of the Act. In those circumstances the magistrate was in error in finding that S. was not in possession of the goods reasonably suspected of being proceeds of crime because S. was in custody at the time the suspicion was formed.**

***DPP v Bodouloh* MC40/03; [2003] VSC 501; 144 A Crim R 37, followed.**

***Rinaldi v Watts* MC13/03; [2003] VSC 2; 138 A Crim R 456, not followed.**

### **BALMFORD J:**

#### **Introduction**

1. This is an appeal under section 92 of the *Magistrates' Court Act* 1989 against the final order of the Magistrates' Court at Geelong made on 11 May 2004 dismissing a charge of possession of proceeds of crime contrary to section 123 of the *Confiscation Act* 1997 (“the Confiscation Act”) wherein Matthew John Oliver was the informant and the respondent, Aaron James Sweeton, was the defendant, and ordering that the Chief Commissioner of Police pay costs in the amount of \$685.

2. On 19 July 2004 Master Evans ordered that the questions of law raised by the appeal were:

(1) Was it open to the Magistrate, upon the evidence then before him, to find that the respondent was not in possession of the goods reasonably suspected of being proceeds of crime because he was in custody at the time the suspicion was formed?

(2) Did the Magistrate err in law in:

(a) determining that the [respondent] did not “possess” the items in question;

(b) his interpretation of the word “possess”;

within the meaning of section 123 of the *Confiscation Act* 1997 as then enacted.

Master Evans further ordered that the order for costs made by the Magistrate be stayed until further order.

3. At the time of the events giving rise to the charge, section 123 of the *Confiscation Act* read as follows:

**123. Possession etc of property suspected of being proceeds of crime**

(1) A person must not receive, possess, conceal, dispose of or bring into Victoria any money, or other property that may reasonably be suspected of being proceeds of crime.

Penalty: Level 7 imprisonment (2 years maximum) a level 7 fine (240 penalty units maximum) or both.

(2) It is a defence to a charge for an offence against sub-section (1) if the defendant satisfies the court that the defendant had reasonable grounds for not suspecting that the property referred to in the charge was proceeds of crime.

4. On 19 September 2003 the informant, in company with other police officers, attended a unit in South Geelong with a search warrant. Upon their arrival the respondent was taken into custody, placed under arrest and given appropriate cautions. Thereafter the informant found certain items of property inside the house and other items in a garage. The respondent himself unlocked the garage in circumstances where the Magistrate found that he probably well knew that if he failed to do so the police would have made a forced entry. The informant said that as he found each of the items he had certain suspicions in respect of them.

5. The respondent was charged with possessing property suspected of being the proceeds of crime and pleaded not guilty. The matter was argued before the Magistrate on the basis that the parties were in agreement that the offence required possession at the time of formation of the suspicion, and that the sole issue before the court was whether the property was in the possession of the respondent when the suspicion was formed.

6. The Magistrate applied the decision of Smith J in *DPP v Dahl*<sup>(1)</sup> in which the court was concerned with section 26 of the *Summary Offences Act* 1966 ("the Summary Offences Act"), which read, and still reads, so far as relevant:

26. (1) Any person having in his actual possession or conveying in any manner any personal property whatsoever reasonably suspected of being stolen or unlawfully obtained whether in or outside Victoria may be arrested with or without warrant and brought before a bail justice or the Magistrates' Court, or may be summoned to appear before the Magistrates' Court.

(2) If such person does not in the opinion of the court give a satisfactory account as to how he came by such property he shall be guilty of an offence.

Penalty: Imprisonment for one year.

(3) Upon proof that any property was or had been in the actual possession of such person or under his control and whether or not such person still has possession or control thereof when brought before the court the property shall for the purposes of this section be deemed to be in his actual possession.

7. In *Dahl* the Court found that in circumstances similar to those in the present case, where the property in question had been found in premises occupied by the defendant after he had been served with a search warrant and was informally under arrest so as to be no longer a free agent, it was not open to find that the defendant had complete present physical control of the property to the exclusion of the police at the time when the relevant suspicion was formed. Accordingly it was not open to find that the defendant had actual possession of the property when the police formed the requisite suspicion.

8. Applying the decision in *Dahl* to the case before him, the Magistrate found that there was no evidence of the respondent having been in possession of the property at the relevant time and accordingly dismissed the charge.

**Submissions**

9. The essential submission of Mr Kayser, for the Director of Public Prosecutions, was that the Magistrate had misdirected himself in finding that the elements of the offence created by section

123 of the *Confiscation Act* were the same as the elements of the offence created by section 26 of the *Summary Offences Act*. The two provisions were differently expressed. He submitted that if Parliament had intended, when enacting section 123, that the elements of the offence thereby created should be exactly the same as the elements of the offence under section 26, it would have drafted the new section in the same terms as the old, which it had not done.

10. He cited the decision of Hood J in *Tatchell v Lovett*<sup>[2]</sup> for the proposition that section 26 established a summary procedure for dealing with persons caught in *flagrante delicto*, so that, as the Court found in *Dahl*, the prosecution must establish, under that provision, that the possession of the goods and the suspicion existed at the same time. The leading case on the nature of possession for the purposes of section 26 is *Moors v Burke*<sup>[3]</sup>, where Isaacs J, delivering the judgment of the High Court (the other Justices being Gavan Duffy and Rich JJ) said, after a lengthy consideration of the authorities<sup>[4]</sup> [Paragraphing added]:

That case<sup>[5]</sup> stood unchallenged until 1912, when the *Police Offences Act* of that year was passed. It is intituled "An Act to amend and consolidate the law relating to Police Offences." And it does amend the enactment now under consideration by inserting the word "actual" three times before the word "possession," and by inserting a provision as to summoning the accused as an alternative to arresting him.

It is clear that Parliament inserted the word "actual" as a definite legislative declaration that the "possession" which is to bring about criminal consequences entailing possibly twelve months' imprisonment is to be no mere legal conception based on real property distinction, but a plain fact personal to the accused.

The very circumstance that the mere "opinion" of the justices that the defendant's explanation is not "satisfactory" coupled with the legislative care to ensure "actuality" of possession as a condition precedent, indicates to us that the justices were not limited by any rigid technical connotation of "actual possession" but had to consider whether in the particular instance, in the circumstances, the man was in such physical control of the property as in ordinary life would, if unexplained, indicate that he was its possessor.

"Having actual possession" means, in this enactment, simply having at the time, in actual fact and without the necessity of taking any further step, the complete present personal physical control of the property to the exclusion of others not acting in concert with the accused, and whether he has that control by having the property in his present manual custody, or by having it where he alone has the exclusive right or power to place his hands on it, and so have manual custody when he wishes.

11. The High Court there draws a clear distinction between the expression "actual possession", the expression which Parliament has chosen to use in section 26, and "possession" unqualified, as a "mere legal conception based on real property distinction", which is the word employed in section 123 as it appeared at the relevant time.

12. Mr Kayser submitted that section 123 did not depend on the suspicion being formed in anyone's mind upon sighting of the goods in the actual possession of the respondent. That provision required evidence first, that the goods were possessed by the accused, and second, objective evidence that the goods might reasonably be suspected of being proceeds of crime. The decision that the goods might reasonably be suspected of being proceeds of crime was, in his submission, a decision to be formed by the court which heard the charge, and by nobody else.

13. In *DPP v Bodoulah*<sup>[6]</sup> Warren CJ said, dealing with section 123 and section 26:

47. The core elements of s26(1) of the *Summary Offences Act* are, first, that a person has in his or her actual possession the property, or; secondly, a person convey in any manner the property and that; thirdly, the property be reasonably suspected of being stolen or unlawfully obtained. Sub-section (3) of s26 is a deeming provision to the effect that upon proof that the property was or had been in the actual possession or under the control of that person, the property was deemed to be in the actual possession of the person.

48. The core elements of s123(1) of the *Confiscation Act* are that a person receive, possess, conceal, dispose of or bring [into] Victoria the property. Thus, the expressions "actual possession" and "conveying in any manner" have been substituted in the *Confiscation Act* by the verbs "received", "possess", "conceal", "dispose of" or "bring into Victoria". Section 123(1) is, therefore, cast in wider

terms than actual possession and conveying in any manner. The sub-section purports to apply to a wider range of activities. “Actual possession” is a passive construction. “Conveying in any manner” is an active verb. By contrast, “receive”, “possess”, “conceal”, “dispose of” and to “bring” are all active verbs.

49. More significantly, for present purposes, there is a difference in the drafting of the two provisions as to the necessary suspicion. Section 26(1) of the *Summary Offences Act* provides that the subject property was “reasonably suspected of being stolen or unlawfully obtained”. Thus, the informant was required to have formed the reasonable suspicion when the defendant had the subject property “in his actual possession” or was “conveying in any manner” the subject property. By contrast, section 123 of the *Confiscation Act* makes it an offence for a person to engage in acts (namely “receive, possess, conceal, dispose of or bring into Victoria”) the subject property “that may reasonably be suspected of being the proceeds of crime (emphasis added). The difference between the two provisions is important. The former required the formation of a reasonable suspicion at a particular point in time. The latter, *Confiscation Act* provision, requires only that the subject property “may reasonably be suspected”. It will be sufficient if the informant reasonably suspects the property may be the proceeds of crime.

50. It seems to me, therefore, that s23 of the *Confiscation Act* cannot be construed in a constrained manner. I consider that to limit the words of s123 and the construction of the expression “suspicion” to a suspicion reasonably formed at the time is to strain the language which Parliament has employed.

14. Mr Kassimatis for the respondent, however, drew my attention to *Rinaldi v Watts*<sup>[7]</sup>, the only other case relating to section 123 which counsel had been able to locate, where Kellam J expressed the view, albeit *obiter*, that “the suspicion that the property so possessed is a proceed of crime must exist at the same time as the possession of such property”. I note that that passage was cited by the Chief Justice in *Bodoulo*<sup>[8]</sup> and that she chose not to adopt it.

15. I would, with respect, accept the reasoning of the Chief Justice, in particular as to her reliance on the words “that may reasonably be suspected” in section 123. Accordingly I find that for the purposes of section 123 the possession of the goods, and the suspicion that they are the proceeds of crime, are not required to be contemporaneous. The words “that may reasonably be suspected” appear to me, as Mr Kayser submitted, to leave the objective question as to whether the goods may reasonably be suspected of being the proceeds of crime for determination by the court trying the accused. Thus in a prosecution under section 123 no question arises as to the contemporaneity of the possession and the suspicion. Accordingly the authorities as to section 26 are not necessarily relevant to a matter arising under section 123.

### Conclusion

16. For the reasons given, I find the answers to the questions contained in the Master’s order to be: (1) No. (2) (a) Yes. (b) Yes.

17. I invite submissions from counsel as to the form of the orders to be made as a result of those findings and as to costs.

---

[1] (1997) 96 A Crim R 502.

[2] [1908] VicLawRp 91; (1908) VLR 645 at 647; 14 ALR 540; 30 ALT 88.

[3] [1919] HCA 32; (1919) 26 CLR 265; 25 ALR 213.

[4] at 273-4.

[5] referring to *Tatchell v Lovett* (*supra*).

[6] [2003] VSC 501 at [47] ff; 144 A Crim R 37.

[7] [2003] VSC 2; 138 A Crim R 456 at 461.

[8] at [34] of her judgment.

---

**APPEARANCES:** For the appellant DPP: Mr B Kayser, counsel. Solicitor for Public Prosecutions. For the respondent Sweeton: Mr T Kassimatis, counsel. Brugman Mellas, solicitors.

---