

13/03; [2003] VSC 2

SUPREME COURT OF VICTORIA

RINALDI v WATTS

Kellam J

20 November 2002; 4 February 2003 — (2003) 138 A Crim R 456

CRIMINAL LAW – POSSESSION OF FIREARMS REASONABLY SUSPECTED OF BEING PROCEEDS OF CRIME – “PROCEEDS OF CRIME” – MEANING OF – CHARGE FOUND PROVED BY MAGISTRATE – WHETHER FIREARMS COULD BE SAID TO BE REASONABLY SUSPECTED OF BEING PROCEEDS FROM A THEFT – WHETHER DEFINITION OF “PROCEEDS” REQUIRES A TRANSFORMATION OR CONVERSION OF PROPERTY FROM ONE FORM TO ANOTHER – WHETHER MAGISTRATE IN ERROR IN FINDING CHARGE PROVED: CONFISCATION ACT 1997, SS3, 123; SUMMARY OFFENCES ACT 1966, S26.

Section 123 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.”

Section 3 of the Act defines “proceeds” as:

“... in relation to an offence ... any property that is derived or realised, directly or indirectly, by any person from the commission of the offence.”

R. was charged with offences under the *Firearms Act* 1996 and an offence under the Act in that he possessed a rifle and a shotgun reasonably suspected of being proceeds of crime. The evidence before the magistrate disclosed that R. was intercepted by police whilst driving his motor vehicle. A search of the vehicle was conducted and a gun and a rifle were found in a golf bag. R. admitted ownership of the unregistered firearms and said that he purchased them from a person at a hotel (or his house). In finding that the firearms found in R.’s possession were reasonably suspected of being stolen, the magistrate found that the firearms were the proceeds of crime and found the charge proved. Upon appeal—

HELD: Appeal dismissed.

1. The use of the words “directly or indirectly” in the definition of “proceeds of crime” in the Act means that the property does not have to be transformed. It would be straining the language to say that the definition of “proceeds” can be read only as being property which has been converted or transformed from the state it was at the time of the offence into some other form. The plain meaning of the words is that the word “proceeds” includes property derived or realised directly or indirectly from the commission of a criminal offence, irrespective of whether such property which is the subject of such criminal offence has been converted into another form.

2. *Obiter.*

(a) The word “possess” as used in s123 of the Act, at least insofar as it relates to personal property, requires actual physical possession and requires knowledge of such possession by the accused.

Tatchell v Lovett [1908] VicLawRp 91; [1908] VLR 645; 14 ALR 540; 30 ALT 88, applied.

(b) The suspicion that the property so possessed is a proceed of crime must exist at the same time as the possession of such property and must be the suspicion of a reasonable person.

(c) A defendant may satisfy a court that he/she had reasonable grounds for not suspecting that the property was a proceed of crime by giving an explanation which is reasonable and feasible and not contradicted.

KELLAM J:

1. This proceeding is an appeal pursuant to s92 of the *Magistrates’ Court Act* 1989 on a question of law from a decision of a magistrate sitting at Moe on 16 May 2001.

2. Dale Rinaldi (“the appellant”) appeared before the Moe Magistrates’ Court on 15 May 2001 charged with three offences under the *Firearms Act* 1996 to which he pleaded guilty. In addition, he was charged with an offence pursuant to s123 of the *Confiscation Act* 1997 (“the Act”) in that

he “ ... at Drouin on the 17th day of November 2001, did possess property namely one bolt action .303 rifle and one lever action .410 shotgun that may reasonably be suspected of being proceeds of a crime.”

3. The appellant pleaded not guilty to that charge. The learned Magistrate convicted the appellant of the offence pursuant to s123 of the Act.

4. The presentation of the appeal before me was unsatisfactory in a number of ways. The order of Master Evans dated 14 June 2002 (but authenticated on 20 June 2002) is stated to rely upon an affidavit sworn by the appellant on 17 June 2002. The affidavit in question was before me upon the hearing of the appeal but counsel for the appellant was unable to produce the exhibits to the affidavit. Copies of some of the exhibits, being Exhibit A, a copy of the charge under s.123 of the Act; Exhibit B, a transcript of submissions made by counsel for the appellant to the learned Magistrate; Exhibit D, a transcript of the learned Magistrate’s findings; and Exhibit E, a copy of the Certified Extract from the Magistrates’ Court Register were provided to me by counsel for the respondent. Exhibit C, being copies of the tapes of the proceeding before the Magistrate was not produced before me, nor were any transcripts of the evidence given before the learned Magistrate.

5. However, the failure to produce any evidence before me as to the evidence given before the Magistrate does not prevent me from dealing with the question of law as stated by the Master pursuant to O.58.09 which is:

“Did the learned magistrate misdirect himself as to the proper interpretation of the expression ‘proceeds of crime’ in s123 (of the) *Confiscation Act* 1997 in ruling, as he must have done, that the original subjects of the crime are proceeds of that crime?”

6. Section 123 states as follows:

“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) or a level 7 fine (240 penalty units maximum) or both.

2. It is a defence to a charge for an offence against sub-s.(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.”

7. The relevant findings of the learned Magistrate as revealed by Exhibit D to the affidavit of the appellant sworn 17 January 2002 were as follows:

“In respect to the second charge of possessing property, namely bolt action .303 and lever action .410, they are reasonably suspected of being proceeds of crime. That relies on s123 of the *Confiscation Act* 1997 and true enough that section comes within a division which is headed ‘money laundering’. This property is not money and has nothing to do with money laundering but, if one takes the plain meaning of the Act which says ‘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, the offence is committed:’ and it is a defence to a charge or an offence against sub-s.(1) that the defendant satisfies the court that the defendant had reasonable grounds for not suspecting the property referred to in the charge was proceeds of crime. The defendant, in this case, I have already found, has possessed goods which are reasonably suspected of being proceeds of crime. That suspicion is held by both the officers. The defence that he had reasonable grounds for not suspecting the property referred to in the charge has not been made out So, that defence is not open to the defendant or one that I don’t accept from the defendant in terms of his satisfaction to the court (sic) and which takes us back to the other issue that is raised by the defendant in his defence, that the property must be proceeds of crime and to be proceeds of crime it must be property that is realised, directly or indirectly, by any person from the commission of an offence. The offence being the crime reasonably suspected. Now, if that crime reasonably suspected is there, proceeds means property derived directly or indirectly by any person from that offence. Now, it seems to me that if it is directly derived it is directly obtained from an offence and if derived means obtained then clearly the offence which was either the theft then the property has been directly obtained as a result of that and I don’t think the Act requires that there be some transformation of the property. Obviously, if that occurs, then the property is indirectly derived or obtained, but direct derivation is a direct obtaining of property from the commission of the offence. In the way the section is worded, in my

view, would not preclude a situation where it is reasonably suspected that a gun has been stolen, that money has changed hands, that the property has come into the possession of the defendant, and then the defendant arrested by the police. The property that he has had is directly obtained through the theft”

8. It will be observed from the above that the Magistrate found that the appellant had in his possession goods (i.e. the firearms), which he found could be reasonably suspected of having been obtained directly by the appellant as the result of a theft by another person. Although the transcript of evidence given before the Magistrate was not produced before me, I was informed by counsel for the appellant that the evidence was that on 17 November 2000 a car driven by the appellant was stopped by police. A search was conducted and police discovered “a gun and a rifle in a golf bag”. The appellant admitted ownership. In an interview conducted an hour later the appellant told police that he had purchased the firearms at a hotel from a person named “Laurie” for the sum of \$200. The appellant gave evidence at the hearing and said that he purchased the firearms from “Laurie” at his house, but told the police an untruth because he was afraid of “Laurie” and afraid of implicating him in the sale of unregistered firearms. In the course of the hearing before me, counsel for the appellant submitted that the finding by the Magistrate that the firearms could be reasonably suspected of having been obtained directly as a result of a theft was not supported by the evidence. The question of law before me is not, however, a question which encompasses a ground that this finding of fact by the learned Magistrate was not supported by the evidence. Counsel for the appellant did not apply to amend the ground of appeal, or to apply for leave to appeal out of time to add a ground that the learned Magistrate had made a finding of fact unsupported by the evidence. Such an application would have faced obvious difficulty in circumstances where the transcript of the evidence which was before the Magistrate was not before me.

9. Accordingly, the question of law to be decided may be stated conveniently as being whether or not, in circumstances where the learned Magistrate found that the firearms found in the possession of the appellant were reasonably suspected of being stolen, they can be said to be “proceeds of crime” within the meaning of s123(1) of the Act. Put another way, the question of law raised is, “Does s123 of the Act apply to property which is directly the subject of a crime, or does it apply only in circumstances where such property has been converted into money or other property?” As the question framed by the Master makes clear, this is a matter of interpretation of the phrase “proceeds of crime” in the context of s123 of the Act.

10. Part 14 of the Act is headed “Money laundering”. Section 121 of the Act defines “proceeds of crime” in Part 14 of the Act as meaning:

“(a) proceeds of a forfeiture offence ... committed in Victoria.”

11. “Forfeiture offence” is defined by s3 of the Act as being an offence referred to in Schedule 1 of the Act. Schedule 1, Clause 1, provides that an “indictable offence against the law of Victoria” is a forfeiture offence. As stated above, the firearms found in the possession of the appellant were found by the learned Magistrate to have been property reasonably suspected to have been “directly obtained through ... a theft.” Accordingly, it is apparent that the learned Magistrate found that the forfeiture offence in this case was the indictable offence of theft.

12. The real issue before me upon this appeal is whether or not the firearms can be said to be reasonably suspected of being “proceeds” of such theft in circumstances where it is apparent that the learned Magistrate found that it was reasonably suspected that those firearms had been stolen.

13. The word “proceeds” is defined by s3 of the Act as meaning:

“... in relation to an offence. ... any property that is derived or realised, directly or indirectly, by any person from the commission of the offence.”

14. The appellant submits that s123 of the Act does not apply where the item of property (said to be a proceed of crime) in specie is said to be suspected of being stolen. It is submitted that there has to be a “transformation for want of a better word”. In support of this submission, Mr Kennedy of Counsel, who appears for the appellant relies upon s1(a) of the Act which provides

that a purpose of the Act is to:

“ ... provide for the forfeiture of the proceeds of certain offences, whatever the form into which they have been converted.”

15. Mr Kennedy submits further that the fact that Part 14 is headed “Money Laundering” leads to the conclusion that the Part is concerned with property which has changed its nature between the time of the commission of the offence from which it is derived and the time at which a person was found to have received it or come into possession of it.

16. Mr Kennedy relies upon the *New Oxford Shorter Dictionary* defining the word “derive” as meaning “obtain, get, draw a thing from a source, arise, be descended, originate from” and defines the word “realise” as (*inter alia*) “make real or realistic, convert into actuality, convert into cash or money”, to support an argument that the property in question must be converted into another form to be a ‘proceed’ of crime.

17. It is further submitted by Mr Kennedy that “the Act and its forfeiture provisions rely on the existence of a breach of another Act” and that for this reason s123 of the Act should be construed narrowly. It is submitted that for there to be “such a draconian change as to mere possession of suspected property in specie such as under s26 of the *Summary Offences Act* 1958, it would require greater particularity” than the provisions of s123 of the Act.

18. It should be noted that s26 of the *Summary Offences Act* 1966 (as amended) provides as follows:

“Unexplained possession of personal property reasonably suspected to be stolen

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 either 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.

4. Where a person is charged before a Magistrates’ Court with an offence under this section the court may proceed to hear and determine the matter notwithstanding that it appears from the evidence that the person charged stole or unlawfully obtained the property concerned in a place outside Victoria in circumstances amounting to the commission of a criminal offence in that place.”

19. It should be observed that s26 of the *Summary Offences Act* 1966 requires proof beyond reasonable doubt that the property in question is in the “actual possession” of the accused before he or she may be convicted of an offence under that section. Assuming, as would appear to be the case, that the Magistrate found that the appellant had in his actual possession, firearms which were reasonably suspected of being stolen, the appellant could have been convicted of an offence under s.26 of the *Summary Offences Act* 1966 on the same evidence which resulted in his conviction under s123 of the Act. Indeed, I was informed upon the hearing of the appeal that the appellant had been charged with an offence under s26 of the *Summary Offences Act* but that such charge had been withdrawn being duplicitous with the charge under s123 of the *Confiscation Act*.

20. As I understand the submissions of Mr Kennedy, it is that s123 of the Act permits conviction upon the Court being satisfied beyond reasonable doubt that the person found in possession of the property in question is in “mere possession” and not necessarily in “actual possession”. His submission is that Parliament could not have intended to legislate to prosecute for mere possession of goods reasonably suspected to be the proceeds of crime in such circumstances.

21. Mr Webster of Counsel who appears for the respondent submits that the learned Magistrate was correct in not accepting the submission made before him that there must be a conversion of

property which may reasonably be suspected to have been stolen for such property to be “proceeds of crime” within the meaning of Part 14 of the Act. Mr Webster submits that the use of the words “directly or indirectly” in the definition of “proceeds of crime” appearing in s121 of the Act means that the property does not have to be transformed. He submits “... the words directly or indirectly mean that if someone is given money from a robbery, we would say, ... you are in possession of the proceeds of crime within the meaning of (s121 of the Act). They have not been transformed. They are just given.”

22. The submission made by Mr Webster on behalf of the respondent is correct in my view. It would be straining the language to say that the definition of “proceeds” as appearing in s3 of the Act (ie “any property that is derived or realised directly or indirectly” from the commission of an offence) can be read only as being property which has been converted or transformed from the state it was at the time of the offence into some other form.

23. The words “derived or realised, directly or indirectly” as they appear in s3 of the Act do not require any such transformation or conversion in form. Certainly property which has been transferred or converted from its original form may be included by the definition, but in my view the plain meaning of the words used in the definition is that the word “proceeds” includes property derived or realized directly or indirectly from the commission of a criminal offence, irrespective of whether such property is the property which is the subject of such criminal offence or has been converted into another form.

24. It follows that the answer to the question of law posed by the Master pursuant to 0.58.09 is that the learned Magistrate did not misdirect himself as to the proper interpretation of the expression “proceeds of crime” in s123 of the *Confiscation Act 1987* in ruling, as he must have done, that the firearms in the possession of the appellant and which he found were reasonably suspected of being stolen were the proceeds of crime. It follows that the appeal should be dismissed.

25. Notwithstanding the conclusion that I have reached in this case that the proceeds of crime referred to in s123 of the Act do not require transformation or conversion into another form to be included by the section, there are a number of other issues raised by this appeal.

26. First, it is apparent from a reading of the Act that one principal purpose of it is to enable forfeiture and recovery of assets, the profits of crime, irrespective of the form into which they have been converted. This is made clear by s1 of the Act and is supported by a reading of the second reading speech of the then Attorney-General of the *Confiscation Bill* on 13 November 1997 in the Legislative Assembly. Clearly, s123 of the Act is far wider than s26 of the *Summary Offences Act 1966* and deals with receiving, concealment, disposition of and bringing into Victoria money or property which may reasonably be suspected of being a proceed of crime as well as possession of the same.

27. It cannot be said that the enactment of s123 of the Act establishes an implied repeal of s26 of the *Summary Offences Act* as s123 of the Act is not clearly and undisputedly contradictory to and inconsistent with s26 of the *Summary Offences Act*, which deals only with the actual possession of or conveyance in any manner of personal property reasonably suspected of being stolen or unlawfully obtained.

28. It is appropriate for me to observe that I have little doubt that the word “possess” as used in s123 of the Act, at least insofar as it relates to personal property, requires actual physical possession and requires knowledge of such possession by the accused – *Tatchell v Lovett* [1908] VicLawRp 91; [1908] VLR 645; 14 ALR 540; 30 ALT 88. Furthermore, it is apparent 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, and must be the suspicion of a reasonable man established by facts from which the necessary inference may be drawn. Furthermore it is clear that s123(2) of the Act contemplates that a defendant may satisfy the Court that he had reasonable grounds for not suspecting that the property referred to in the charge was a proceed of crime by giving an explanation which is reasonable and feasible and not contradicted.

29. It should be observed that a number of the matters referred to in the preceding paragraph are also relevant to a prosecution under s26 of the *Summary Offences Act*. For this reason, it

appears to me that the approach taken by a magistrate in relation to a prosecution for possession of goods which are a proceed of crime under s123 of the Act, in circumstances where a prosecution might also be brought pursuant to s26 of the *Summary Offences Act* may have little or no practical difference.

30. Nevertheless, in certain circumstances, as here, it is apparent that the same conduct may render a person liable to punishment under both s26 of the *Summary Offences Act* and under s123 of the Act. In my view this is unsatisfactory and requires legislative consideration. Uncertainty of this nature is inappropriate in the criminal law. However, the answer to this issue is not to construe s123 of the Act in a strained manner as has been submitted by the appellant in this proceeding. As stated above, the plain meaning of the words of s123 of the Act do not require a transformation or conversion of property from one form to another and for that reason the appeal must be dismissed. It follows that the appellant should pay the costs of the respondent.

APPEARANCES: For the appellant Rinaldi: Mr S Kennedy, counsel. Katsis Purcell Anthony, solicitors. For the respondent Watts: Mr R Webster, counsel. Office of Public Prosecutions.
