18/92

SUPREME COURT OF VICTORIA

NICHOLLS and ANOR v YOUNG and ANOR

Smith J

30 January, 11 February 1992 — [1992] VicRp 62; [1992] 2 VR 209

SUMMARY OFFENCES – UNLAWFUL POSSESSION – LARGE AMOUNT OF CASH FOUND IN MOTOR VEHICLE TOGETHER WITH A QUANTITY OF GREEN VEGETABLE MATTER – VARIOUS SUSPICIONS HELD AS TO SOURCE OF MONEY INCLUDING DRUG TRANSACTIONS – EXPLANATIONS UNSATISFACTORY – "OR UNLAWFULLY OBTAINED" – MEANING OF – WHETHER REASONABLE TO SUSPECT MONEY STOLEN: *SUMMARY OFFENCES ACT* 1966, S26.

1. The phrase "or unlawfully obtained" in s26(1) of the *Summary Offences Act* 1966 ('Act') should be restricted to cases where property is obtained in a manner analogous to theft, e.g. obtaining money/ financial advantage by deception.

***Grant v R* [1981] HCA 32; (1981) 147 CLR 503; 35 ALR 97; 55 ALJR 490, applied.**

***Hofstetter v Thomas* [1968] VicRp 20; (1968) VR 199, referred to.**

2. Where a large amount of money was found by police officers upon intercepting two persons in a motor vehicle in the early hours of the morning and the explanations given as to the source of the money were unsatisfactory and inconsistent and a likely suspicion was that the money was the proceeds of a drug transaction, it was open to a magistrate to be satisfied that it was reasonable to suspect that the money may have come from theft or some similar type of offence and accordingly, find the charge laid under s26 of the Act proved.

SMITH J: [1] Garry William Walton and Dean George Nicholls have appealed to this Court pursuant to s92 *Magistrates' Court Act* 1989 against orders made against them at the Magistrates' Court at Geelong. Walton was convicted of being in possession of $57,825 suspected of being stolen or unlawfully obtained. He was sentenced to four months' imprisonment, which sentence was suspended. The Court also ordered that the money be forfeited and paid to consolidated revenue. Nicholls was convicted of being in possession of $34,095 suspected of being stolen or unlawfully obtained. He was sentenced to four months' imprisonment, which sentence was suspended. The money seized was also ordered to be forfeited and paid to consolidated revenue.

The charges alleged breaches of s26 of the *Summary Offences Act* 1966. The relevant provisions are in the following terms:

> "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 in any State or Territory of the Commonwealth may be arrested either with or without warrant and brought before a magistrates' court, or may be summoned to appear before a 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."

By orders made 30th November 1990 Master Wheeler called upon the respondent informants to show cause why an appeal from the above orders should not be allowed. The following questions of law were said to have arisen –

> **[2]** 1. Whether, upon the true construction of s26(1) of the *Summary Offences Act* 1966 (Vic) (as amended), the expression, 'personal property' relates to, refers to, covers, and/or includes cash.
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> 2. Whether, upon the true construction of s26(1) of the *Summary Offences Ad* 1966 (Vic) (as amended), the expression, 'unlawfully obtained' only refers to personal property the obtaining of which is unlawful because it takes a form analogous to theft.

3. Whether, upon the true construction of s26(1) of the *Summary Offences Act* 1966 (Vic) (as amended), the expression, 'unlawfully obtained' may refer to personal property obtained in a way which involves a breach of law other than a form analogous to theft.

4. Whether, upon the true construction of s26(1) of the *Summary Offences Act* 1966 (Vic) (as amended), the expression, 'unlawfully obtained' may refer to personal property obtained as a result of, or in consideration for, the selling of drugs or analogous conduct, whether or not such conduct is proscribed by the *Drugs, Poisons and Controlled Substances Act* 1981 (Vic) (as amended).

5. What matters, circumstances, and evidence upon the true construction of s26(1) of the *Summary Offences Act* 1966 (Vic) (as amended), may be considered and/or taken into account by a tribunal of fact in determining whether or not the element of 'reasonable suspicion' has been proved.

6. Whether there was evidence upon which the learned Magistrate could find that the money which was the subject of the charge contrary to s26(1) of the *Summary Offences Act* 1966 (Vic) (as amended) was 'reasonably suspected of being stolen or unlawfully obtained'.

7. Was there evidence upon which the learned Magistrate could find that the Appellant was in possession of any money reasonably suspected of being stolen of unlawfully obtained."

The appellants did not proceed with ground 1. **[3]** In argument, the appellants dealt with the grounds in two groups. There were arguments relevant solely to grounds 2, 3 and 4 which also bore on ground 7. There were arguments relating to grounds 5 and 6 which also bore on ground 7.

In relation to the first group of arguments, the appellants' first submission was that the magistrate had found that the suspicion entertained by the police as to the origin of the monies was that they had been obtained by trafficking in drugs. They further submitted that properly construed, the expression "unlawfully obtained" did not extend beyond actions analogous to theft such as embezzlement and obtaining property by deception, and did not extend to monies obtained as a result of some other form of illegal activity, such as selling drugs. They further submitted that on the evidence before the magistrate, it was not open to him to find that there were reasonable grounds for suspecting that the money had been stolen or obtained unlawfully in the relevant sense.

Crucial to the first group of arguments (relating to grounds 2, 3, 4 and 7) is the question of the finding made by the learned magistrate about the nature of the suspicion entertained by those arresting the appellants.

Turning to the evidence, the affidavits filed on behalf of the appellants deposed to Constable Keith Young, the informant against Mr Nicholls, giving evidence *inter alia* that the appellants were stopped in a motor car travelling south in Torquay Road, Grovedale on 14th August 1990 at 5.46 a.m. He said he formed the view that Walton's speech was slurred and a preliminary breath test was administered. He asked Walton to open the boot, and he did so. There were two black garbage **[4]** bags in the boot and there were traces of green vegetable matter in both bags. There were 29 grams of green vegetable matter in the two black garbage bags. He said that Walton indicated he did not know what it was, saying the bags had only had dirty clothes in them. He asked Walton whether he had anything in the car which he should not have, and he replied, "just some money".

Questioned further, he said it was money he had won gambling. He said it was in a brown bag which was situated on the rear seat behind the driver. The informant found a large amount of cash wrapped in a green shirt. It had been done up in bundles. He then said in his evidence, "I immediately suspected that the money was stolen or unlawfully obtained". Asked again about the money at a later stage at the scene, Walton said again he had won it gambling. Asked where, he said "everywhere - casinos you know". Put that there were no casinos in Victoria, he said he had won it playing Black Jack. He said he could not remember where he had been playing. He could not remember if he had been playing in Geelong. It was put to him that the money was stolen or unlawfully obtained in some way and he replied that he had won it gambling.

A little later, Sergeant Bardi, Senior Constable Young and Constable Buttigieg searched and questioned Nicholls. In his left pocket of his jacket a sum of money was found in a plastic bag and in the right pocket another bag was found which had a large sum of money in it. A further

sum of $3,480.00 was found in his wallet and $715.00 in another pocket. Another police officer named Bardi put to him that he believed the money was stolen or unlawfully obtained, and asked him where he got it from. He said he had sold his mother's house. Asked **[5]** why he had it he replied that he did not trust the banks. He said he had had it for two weeks. Asked again where it had come from and Nicholls replied, "Gambling at the casino, it's my money". Messrs. Walton and Nicholls were then taken to the police station. Further questioning took place.

Questioned by Mr Galbally for one of the accused, Constable Young said that he suspected that the money could have come from any number of illegal activities. He said it might have been a bank robbery, the sale of stolen goods or drug trafficking. Cross-examined by Mr Rolfe representing the other accused, he said that he suspected that the money was stolen because of the large quantity of cash and their possession of it at that time of the morning. He said that he did not think that he had fallen on drug dealers. He did not know why he thought it might be drug money. He did not think the money was counterfeit. He felt that it had been unlawfully obtained. He felt this because it was an extremely large quantity of money and it was at that time of the morning. This was the basis of his suspicion. He agreed it possibly could have been the proceeds of illegal activity. He said he was the person who formed the belief. He agreed that the money was part of the evidence on the trafficking charge. Later he said that his suspicion was based on any illegal activity. He agreed that drug trafficking was an unlawful activity. He said that their subsequent enquiries had not revealed any large robberies or burglaries where sums of cash of the relevant magnitude recovered were stolen.

Constable Buttigieg confirmed the evidence in chief of Constable Young. In cross-examination he said, *inter alia*, **[6]** that he suspected the whole of the money as being stolen or unlawfully obtained. He had a suspicion because of the time of the morning, and particularly because drugs were found. He said that the appearance of both of them looked the part. He said he believed that they had picked up a couple of drug traffickers. He spoke to D24. He agreed he told them that he believed they had picked up a couple of drug traffickers. He said that Nicholls looked the part. He did not hear Nicholls say anything about his mother's house while they were at the scene of the interception.

Sergeant Bardi was questioned and said that he had a belief that the contents of the brown bag were stolen or unlawfully obtained. He said he had that suspicion because of the early hour in the morning and because this was a renter vehicle, and because, on an inspection of the boot, the stench of cannabis was overpowering. He said he did not know whether there had been a robbery or a drug rip-off or a burglary or the sale of drugs. His suspicions were based on those things. He again repeated that the money for all he knew could have been from the proceeds of a burglary or an armed robbery or from the sale of drugs.

At the conclusion of the Crown case, a no case submission was made on behalf of each of the accused. In submissions made on their behalf, it was said, *inter alia*, that the arresting officers had formed the view that the two accused were drug traffickers and that the money in all of the circumstances represented the proceeds of the sale of drugs. It was conceded that such a view was not in the circumstances unreasonable, but it was argued that it could not be said that **[7]** this brought the money within the meaning of the words "or unlawfully obtained" in s26(1) of the Act. The affidavit material records that the police prosecutor argued, *inter alia*, that the money could be the subject of a charge contrary to s26(1) and that the suspicion of the police officers was justified and reasonable in all the circumstances.

In the course of giving his reasons, the learned magistrate referred briefly to the evidence, stating amongst other things, that the informant, Constable Young, suspected that the money in the bag was stolen or unlawfully obtained. The learned magistrate referred to the explanations given by Walton expressing the view that they were inconsistent, in that he said he had been gambling at casinos and playing Black Jack and then further said he could not remember which casino. In relation to Mr Nicholls, he referred to the various explanations offered at the time that he had sold his mother's house and that he did not trust banks and the change to the reference to gambling at casinos. He said that he accepted Constable Buttigieg's evidence that when he found the money he believed it was stolen or unlawfully obtained.

His Worship then went on to say that he was in no doubt that the police suspected the

appellants of selling drugs and said that this was a reasonable belief. Later he said that the prosecution must produce evidence that the money was reasonably suspected of having been stolen or unlawfully obtained, and stated that he was satisfied that there was evidence that was reasonably capable of founding the suspicion. He referred in support of this conclusion to the fact that there was a large amount of money found in the early hours of **[8]** the morning and there was the "admission" by Walton. He said the varying versions were extremely thin and described as astonishing the fact that Walton could not recall where he had won $57,000.

In the course of argument, the learned magistrate had been referred to New South Wales and Victorian authority on the meaning of the expression "or unlawfully obtained". The learned magistrate, in his reasons, referred at this point to the New South Wales authorities and said that they were not particularly helpful. It is not explained in the reasons why he took this view. At this point, however, he stated that it was incumbent on the appellants to indicate the courses they intended to take to provide an answer, he having obviously concluded at this point that the requirements of s26(1) had been made out on the Crown evidence.

The appellants then led evidence in the course of which various explanations were given for the money that was found in their possession. At the conclusion of the evidence, further submissions were made. At the conclusion of the submissions, the learned Magistrate gave his findings and reasons in a summary form. He referred to the fact that he had found that the police suspicions that the money was stolen or unlawfully obtained were reasonable, and then went on to consider the explanations offered in evidence by the appellants. He stated that the charges are proved unless there are satisfactory explanations that the money was not stolen or unlawfully obtained, and that the burden was on the appellants on the balance of probabilities to prove a satisfactory explanation, demonstrating that the money was not stolen or **[9]** unlawfully obtained. He stated that he was not persuaded that the explanations were satisfactory and found the charges proved.

At some points in the record of the proceedings placed before me, there are statements by the learned magistrate that provide a basis for arguing that the learned magistrate held that the suspicion upon which the arresting officers acted was that of a suspicion of drug dealing, not a suspicion of theft or some analogous offence. A fair reading, however, of the learned magistrate's reasons both at the "no-case" stage and at the conclusion of the proceedings is that he did not limit himself in the way alleged on behalf of the appellants. While he appears to have held that the police officers did suspect that the money may have been obtained from drug dealing, I am satisfied that he also held that they suspected that the money may have come from theft or some similar type of offence.

It was argued on behalf of the appellants that to have inconsistent suspicions prevents them being reasonable. I do not accept that argument. It is in the nature of suspicions that it is possible to hold more than one suspicion at the same time and to hold suspicions which are inconsistent. This, as I see it, is inevitable in many cases. A person might have preferred suspicions – for example in this case drug dealing – but this does not mean that a person could not fairly and reasonably hold other suspicions in relation to the source of the money.

I was cited several authorities on the question of the meaning of "or unlawfully obtained" in similar legislation **[10]** (see *Aldridge v Marks* (1944) 44 SR (NSW) 69; 61 WN (NSW) 2; *Hofstetter v Thomas* [1968] VicRp 20; [1968] VR 199; *Grant v R* [1981] HCA 32; (1981) 147 CLR 503; 35 ALR 97; 55 ALJR 490 and *Purdon v Dittman* [1972] 1 NSWLR 94). Such legislation is of long standing. These authorities directly or indirectly support the view that "unlawfully obtained" should be restricted to cases where the property was obtained in a manner analogous to theft (for example obtaining money by deception or financial advantage by deception).

It was argued on behalf of the appellants that the magistrate erred in rejecting the New South Wales authorities and apparently upholding the view that the words "or unlawfully obtained" extend to include money obtained as a result of criminal activity of a kind not analogous to theft.

I have come to the conclusion that the learned magistrate did err in interpreting the words in the way he did. Counsel for the respondents sought to attack the basis of the above authorities. He argued that the authorities were incorrect in suggesting that the words should be interpreted

ejusdem generis with the word "stolen" because that rule only operates where you have a series of references to objects or things and a genus can be identified from the series. I was referred, however, by counsel for the appellants to Maxwell on the *Interpretation of Statutes* 12th Edition 1969 at p299 where the point is made that the authority for such a proposition is very slight and that there are many instances of the rule being applied to two word phrases. Various cases are cited in that work. He further argued that the views expressed by His Honour Mr Justice Menhennitt in *Hofstetter v Thomas* (above) are **[11]** *obiter*. It might be put more accurately I suggest that his argument assumed the validity of the *ejusdem generis* approach.

Counsel for the respondent also argued that the passing of the amendments to the *Crimes Act* re-defining the law of theft had the effect of giving statutory meaning to the word "stolen" in s26(1) and thereby introduced a single offence where it might have been said a number were covered by the expression in the past. Even if that be so, it is also clear that scope was still left for the expression "unlawfully obtained" to apply to offences such as obtaining property by deception or financial advantage by deception. Those offences were not incorporated into the definition of theft. Ultimately the *ejusdem generis* argument does not, in my view, depend upon there being multiple offences covered by the expression "stolen". The construction adopted by courts in the past does not appear to me to turn on that distinction. It would not, in fact, matter if only one offence was referred to by the expression "stolen". I have come to the conclusion particularly in the light of the comments of the High Court in *Grant v R* (above) that the strict interpretation involving the application of the *ejusdem generis* principle should have been applied by the learned magistrate. It appears to have been of long-standing and appears to have been approved by the High Court.

The fact that an error is demonstrated, however, does not appear to me ultimately to assist the appellants because I am satisfied that the learned magistrate also found that the arresting officers acted on suspicion that the money was stolen. The convictions can and should be supported on that **[12]** basis as the error made is not fatal to the decision to convict.

I turn to consider the questions raised in paragraphs 5 and 6 and also in paragraph 7. It was common ground that several elements of the concept of reasonable suspicion are well established by authority. Firstly, the reasonable suspicion had to be entertained at the time the persons were in possession of the property in question (e.g. *Rowe v Galvin* [1984] VicRp 26; [1984] VR 350; *McDonald v Webster* [1913] VicLawRp 114; [1913] VLR 506; 19 ALR 563; 35 ALT 101; 52 ALJR 404). Secondly, the reasonable suspicion must attach to the property and not merely to the person in possession (*O'Sullivan v Tregaskis* [1948] SASR 12 and *Yeo v Capper* [1964] SASR 1). Thirdly, the suspicion must be entertained upon reasonable grounds (*Wallace v Hansbury* [1959] SASR 20 and *George v Rockett* [1990] HCA 26; (1990) 170 CLR 104; 93 ALR 483; 64 ALJR 384; 48 A Crim R 246; *Nicholas v Fleming* [1959] Tas SR 165; *Deudney v Paulston* (1940) 57 WN (NSW) 40). Fourthly, the mere fact that a man makes an untrue statement as to how he came into possession of goods when questioned is not in itself a ground for believing them to be stolen (*McDonald v Webster*) (above).

The respondents accept the correctness of those propositions. The appellants argue that accepting those propositions, there was not sufficient evidence to support a finding that the suspicion held was of the requisite kind, and that it was reasonable. The test is whether there is any reasonable view of the evidence that is consistent with the learned magistrate's decision to so find on the evidence (see *Young v Paddle Bros Pty Ltd* [1956] VicLawRp 6; [1956] VLR 38; [1956] ALR 301). I have come to the conclusion that in the light of the evidence adduced for **[13]** the informant the test is satisfied. The learned magistrate referred to the large amount of money involved, the fact that it was found in the early hours of the morning, and the unsatisfactory answers given by Walton. While in all the circumstances a suspicion that the money was the proceeds of a drug sale may have been a more likely one and therefore a more reasonable one, this did not mean that it was unreasonable to suspect that the money was stolen. I have come to the conclusion that the learned magistrate's view of the evidence was a reasonable one and entitled him to find against the appellants on the issue. The result is that the questions of law raised should be answered as follows.

Question 2: Yes. Question 3: No. Question 4: No. Question 6: Yes. Question 7: Yes.

Question 1 was abandoned and question 5 should not be answered as it is far too broad to raise properly a question of law. The result of my conclusion is that the learned magistrate's decision to convict the appellants on the charge of being in possession of personal property reasonably being suspected of having been stolen or "unlawfully obtained" is upheld, notwithstanding that he erred in taking the view that money obtained from the sale of drugs is on a proper construction of s26(1) personal property "unlawfully obtained".

The question then arises as to the appropriate **[14]** orders to be made. I will defer my decision on that question until the parties have had an opportunity to make submissions.

Solicitors for the appellants: Galbally and Rolfe.
Solicitor for the respondents: JM Buckley, solicitor to the Director of Public Prosecutions.
