

08/82

SUPREME COURT OF VICTORIA

FERGUSON v NIKODJEVIC

Gray J

16 December 1981

CRIMINAL LAW – UNLAWFUL POSSESSION – EXPLANATION GIVEN BY DEFENDANT AS TO HOW HE CAME BY PROPERTY REASONABLY SUSPECTED OF BEING STOLEN – TEST TO BE APPLIED BY MAGISTRATE IN DETERMINING CHARGE – EXPLANATION NOT SATISFACTORY – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: SUMMARY OFFENCES ACT 1966, S26.

When dealing with a charge of unlawful possession and hearing the explanation given by the defendant as to how he came to be in possession of the suspect property, the Magistrate, in dismissing the charge, said:

"I find a great deal of suspicion attaches to the possession by the defendant ... the explanations given by the defendant leaves a lot to be desired but I am giving the defendant the benefit of those doubts and I accordingly dismiss the charge".

Upon an order nisi to review—

HELD: Order absolute. Dismissal set aside. Remitted to the Magistrate to be dealt with in accordance with the law.

The Magistrate misdirected himself as to the operation of Section 26 of the *Summary Offences Act* 1966. The authorities make it clear that before acquitting the defendant, the Magistrate had to be satisfied on the balance of probabilities that the defendant had come by the property honestly.

GRAY J: ... *Willis v Burnes* [1921] HCA 43; (1921) 29 CLR 511 (which was followed by Lowe J in *Ethell v Tobin* [1927] VicLawRp 51; [1927] VLR 371; 33 ALR 293; 49 ALT 27). The first named case states:

"Where the Crown has established that the defendant knowingly was in possession of certain property and that that property might reasonably be suspected of having been stolen, the onus is upon the defendant of satisfying the Court that he came by the property honestly, and that that onus is not discharged if the justice is left in doubt as to whether the defendant came by the property honestly. Thus it is clear that the defendant does bear the onus of establishing to the Court's satisfaction that he came by the property honestly. It is clear enough that that onus is merely to satisfy the Court upon the balance of probabilities."