06/73

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v BUGGEE

Winneke CJ, Adam and Crockett JJ

5 April 1973

CRIMINAL LAW – DEFENDANT CHARGED WITH THEFT OF A MOTOR CAR AND RECEIVING ANOTHER MOTOR CAR – FOUND GUILTY OF EACH CHARGE – A BUNDLE OF PHOTOGRAPHS ADMITTED INTO EVIDENCE – ONE PHOTOGRAPH SHOWED THE DEFENDANT WITH THE CO-ACCUSED – PHOTOGRAPHS WERE RELEVANT TO THE ISSUE OF IDENTIFICATION AND LEGALLY ADMISSIBLE IN EVIDENCE AGAINST THE CO-ACCUSED – WHETHER TRIAL JUDGE FELL INTO ERROR IN ADMITTING THE PHOTOGRAPHS INTO EVIDENCE – DOCTRINE OF RECENT POSSESSION – DEFENDANT IN POSSESSION OF THE STOLEN VEHICLES RECENTLY AFTER THEY HAD BEEN STOLEN – WHETHER TRIAL JUDGE MISDIRECTED THE JURY IN RELATION TO THE DOCTRINE OF RECENT POSSESSION – WHETHER DEFENDANT PRECLUDED FROM RECEIVING A FAIR TRIAL DUE TO TRIAL JUDGE'S CONDUCT – QUESTIONS ASKED BY JUDGE IN THE NATURE OF CROSS-EXAMINATION – WHETHER DEFENDANT WAS GIVEN A FULL OPPORTUNITY TO PRESENT HIS DEFENCE –WHETHER THERE HAD BEEN A MISCARRIAGE OF JUSTICE.

HELD: Application against conviction refused.

1. In relation to the admission of the bundle of photographs into evidence, the photographs were relevant to the issue of identification of the co-accused and were legally admissible. Whilst the photographs were not directly relevant to the defendant, it was no more than a case of indirect consequence suggesting not that the defendant himself was a person who was known to the police but that he was an associate of somebody who was so known.

2. In relation to the doctrine of recent possession, if the accused gives no explanation, or if the jury is satisfied that the explanation given is untrue, then the jury may convict. The trial judge's direction at no stage placed any onus of proof upon the accused. The jury could not have been left under any misapprehension in view of the judge's direction that they could not find the accused guilty of the charges unless they were satisfied beyond reasonable doubt in the ultimate that the accused was guilty of the offences charged.

3. In relation to the Judge's interposing and asking questions, it would have been better if the Judge had not asked a number of questions but left those questions to be asked by counsel. Notwithstanding the interruption by way of questioning by the Judge, the accused was given full opportunity to state his defence and when looking at the conduct of the trial as a whole it was not open to conclude that there had been interference by the trial Judge to such a degree that there was a miscarriage of justice.

WINNEKE CJ: The applicant, Arthur Walter Buggee, together with one Donald Stuart Brown-Kerr, was presented for trial on the 12 September 1972 at the County Court at Melbourne before His Honor Judge Frederico on a presentment containing four counts. The first count charged that on or about the 14 August 1970 the accused stole a motor car the property of one Sutton; the second count charged the accused in the alternative with receiving that car. The third count charged them that on or about the 22 August 1970 they stole a motor car the property of one Clive Geoffrey Rosenberg, and the fourth count was an alternative count charging them with receiving the car of Rosenberg.

After a lengthy trial, on the 28 September, the applicant was convicted on count one, that is the theft of the car of Sutton; he was acquitted on the third count of stealing the car of Rosenberg, but convicted on the fourth count of receiving that car. His co-accused Brown-Kerr, was acquitted on the presentment. After admitting a number of prior convictions the applicant was sentenced to twelve months' imprisonment on each of the counts on which he was convicted; the learned Judge fixed a minimum term of twelve months.

The applicant has applied for leave to appeal against both conviction and sentence, but

at the commencement of the hearing Mr Lennon, who appeared on his behalf, intimated that it was not desired to proceed with the appeal against sentence, and accordingly leave was granted to file late notice of abandonment.

In order to understand the grounds of appeal that have argued on the application against conviction, the facts may be relatively shortly stated, notwithstanding the great volume of evidence that was put before the jury. There was evidence that Mr Sutton's car, a blue Ford Falcon 1970 sedan, was stolen after having been parked in South Yarra on the 14 August 1970. There was evidence the car was recovered by police officers on the 7 September standing outside the applicant's flat in Hampton. On that day the police officers were given the keys of the car by the wife of the applicant. The police then drove it away. It was next seen by Mr Sutton at the Police Garage in Brunswick, in September 1970.

On the evidence it was open to the jury to find that the car that was recovered outside the applicant's' flat at Hampton was the car which was stolen from Mr Sutton, although in the meantime certain alterations had been made to it. When recovered, a new registration label had been substituted, number plates that were on it at the time of the theft had been taken off and other number plates had been installed. The original wheels of the car had been removed and replaced by other wheels.

It is sufficient, we think, to say that on the evidence it was open to the jury to find that the new registration label and the new number plates came from an old Ford Customline car that had been transferred from Christeys Motor Auctions allegedly to one Edward Hargreaves, giving the address of 23 Bertram Avenue, Huntingdale. The remainder of the old Ford Customline was located at the back of certain business premises where the applicant carried on his motor business.

There was also evidence that Mr Rosenberg's car was stolen also whilst parked in South Yarra on the night of the 22 August 1970. There was further evidence which justified the jury, if they so saw fit, in tracing Rosenberg's car to the possession of the applicant.

An unsigned record of interview was put in evidence against the applicant, a police officer concerned giving evidence that it truly recorded questions put to him and answers made; and in that record of interview, if the jury accepted it as being accurate, the applicant made admissions which fully involved him in both crimes of which he was ultimately convicted by the jury.

The applicant gave evidence and called other evidence on his own behalf. It is sufficient for present purposes to say that he denied committing any of the offences with which he was charged. In substance, he said that he had purchased Mr Sutton's car in all good faith from a man named Hargreaves. He denied having anything to do with the theft or the receiving of the car belonging to Mr Rosenberg.

Three grounds of appeal were argued by Mr Lennon. Mr Lennon, we think, has argued those grounds with great care. He has fully argued the case and has put, we think, everything that can be put under the grounds of appeal which are now relied upon on behalf of the applicant. We should say that in the original notice of application certain grounds of appeal were stated, but the Crown not objecting, we gave leave at the commencement of the hearing of this application to Mr Lennon to substitute the three grounds of appeal argued, for those which were previously stated in the notice of application.

The first ground is that the learned trial judge wrongly exercised his discretion in admitting into evidence a bundle of photographs which were marked as exhibit "D". These photographs were tendered by the Crown against the applicant's co-accused, Donald Stuart Brown-Kerr. They consisted of twelve photographs, including a photograph of Brown-Kerr, and indeed, a photograph of the applicant himself. These photographs had been shown by police officers to a witness named Andrews for the purpose of seeing whether Andrews could identify the co-accused Brown-Kerr. Andrews was a man who conducted a service station at Beach Road, Beaumaris, and he gave evidence at the trial that on the 31 August 1970, a man giving the name of Edward Hargreaves had driven the 1970 GT Falcon, identified by Mr Sutton as his, to his service station for the purpose of obtaining a certificate of roadworthiness. Andrews identified the car which was

claimed at the trial to be that of Sutton and he also identified the co-accused Brown-Kerr as being the man coming to his establishment under the name of Hargreaves. When shown the bundle of photographs by the police, the witness Andrews then identified the co-accused Brown-Kerr. At the trial the photographs, excluding the photograph of the present applicant — that is the eleven remaining photographs — were tendered by the Crown. Objection was taken by counsel for the defence but the learned judge, after considering the matter and in the exercise of his discretion admitted the photographs as part of the identification evidence given by the witness Andrews.

Under the first ground of appeal, Mr Lennon submitted that the judge had wrongly exercised his discretion in admitting the eleven photographs. He did not deny, as he could not, that the photographs were relevant to the issue of identification of the co-accused and accordingly were legally admissible in evidence. What Mr Lennon argued was that it was well open to jury, from the photographs, to conclude that they were photographs which had been in the possession of the police, and accordingly to infer that the co-accused Brown-Kerr was a man known to the police, and accordingly that the present applicant was an associate of a man who was known to the police.

Mr Lennon contended that in that way prejudice might or would ensue to the applicant, prejudice of a kind that outweighed the probative value of the photographs, and that the learned judge therefore had wrongly exercised his discretion. In putting this argument, Mr Lennon drew the attention of the Court to the fact that counsel for the co-accused had given an undertaking that if the photographs were excluded from evidence he would not base any adverse comment on that omission.

In considering this matter it must, however, be remembered that the photographs constituted relevant evidence against the co-accused Brown-Kerr. It must also be remembered that accordingly they were, under the rules of evidence, legally admissible and that the onus was therefore upon any accused person seeking to exclude them to satisfy the judge that as relevant evidence they should be excluded in the exercise of his discretion. Where a question of exercise of discretion is involved on appeal there is a heavy onus upon an appellant alleging that the discretion has been wrongly exercised. In accordance with many well-established authorities there is a presumption, and a strong presumption, that the discretion is properly exercised, and an applicant who seeks to assert the contrary must show that in some discernible way the discretion has miscarried, including that on the face of it the decision to admit the evidence was manifestly unjust.

In considering a matter of this particular kind, it must be borne in mind that it cannot be said that the photographs are without substantial probative value because in order to test the identification of the witness giving the evidence it is very material for the jury to see as against what the particular identification was judged. Moreover, in the present case, as we have said, the photographs were not directly relevant so far as the applicant was concerned. It could be no more, so are as he was concerned, than a case of indirect consequence suggesting, as it was put by Mr Lennon, not that he himself was a person who was known to the police, but that he was an associate of somebody who was so known.

We do not see that the learned judge made any error in the exercise of his discretion, and, accordingly, there is no basis which would justify the interference of an appellate Court. For that reason the first ground of appeal cannot be sustained.

The second ground is:

> "That the learned judge erred in his direction and further direction to the jury concerning the doctrine of recent possession and the crime of receiving."

The case for the Crown was put against the applicant in two ways, and indeed on a combination of both. It was put that he was in possession of the stolen vehicles recently after they had been stolen, and that accordingly it was open to the jury to convict him of either larceny or receiving on the basis of the doctrine of recent possession. The other way in which the case was put against the applicant was on the basis of the record of interview which the police said the applicant had made, and which contained full confessions on his part.

It thus became incumbent upon the learned Judge to direct the jury concerning the doctrine of recent possession. This he did, and what he told the jury appears in the transcript at page 626. He there said:

> "The Crown here relied upon the doctrine of recent possession. That is where a person is in possession of property recently stolen, and when asked to do so fails to give a satisfactory account of his possession or gives an account which you are satisfied is untrue — it is open to you to infer that he is either the thief or the guilty receiver according to the circumstances. Now, that is a commonsense doctrine."

His Honor then proceeded to give an illustration of the application of the doctrine, and then proceeded in these terms:

> "It is the explanation that is important. Now if he gives an explanation consistent with innocence and you think it could be true but you are not necessarily convinced that it is, the doctrine of recent possession does not apply. In other words, the explanation does not have to satisfy you beyond reasonable doubt that it is true. If he has an explanation and you think it does not sound too good to you but it could be true then the doctrine of recent possession does not apply. The weight given to such an explanation depends on the nature of the goods and the time that has elapsed since the goods were stolen and the time that it was proved to be in the possession of the accused person."

After the jury had retired to consider their verdict, indeed a considerable time after they had originally retired, they retuned into court, the foreman having passed to the learned judge a note stating, "Please may we have a copy of the law on doctrine of recent possession." The learned Judge then said:

> "Mrs Forelady, ladies and gentlemen, I received your note asking for a copy of the doctrine of recent possession. I cannot give you a copy of that and all I propose to do is tell you again what that doctrine is: where a person is in possession of property recently stolen and when asked to do so fails to give a satisfactory account of his possession or gives an account which you are satisfied is untrue it is open to you to infer that he is either the thief or the guilty receiver according to the circumstances. If he gives an explanation consistent with innocence and you think it could be true but you are not necessarily convinced that it is, the doctrine of recent possession does not apply. So he does not have to satisfy you that his explanation is true. I will read it to you again: 'If he gives an explanation consistent with innocence, and you think it could be true but you are not necessarily convinced that it is, the doctrine of recent possession does not apply.'"

Mr Lennon submitted that those directions by the learned Judge were deficient in law in two respects. He first contended that in so stating the doctrine the learned judge had not directed the jury that they must still be satisfied before convicting the accused of his guilt beyond reasonable doubt. Mr Lennon contended that that was an essential part of the direction to be given to the jury in stating the doctrine of recent possessions and that failure to state it in connection with the doctrine constituted a misdirection in law. In the second place, Mr Lennon submitted that the directions so given by the learned Judge were so expressed that they were apt or might lead the jury to think that some onus lay upon the accused to prove that his explanation might be true.

In considering these objections, the charge, of course, must be read as a whole; and it is relevant to state that before explaining the application of the doctrine of recent possession, the learned Judge had given the jury a direction in unexceptional and conventional terms concerning the ultimate burden of proof in relation to the crimes charged.

At page 621, this appears from the transcript:

> "Having found the facts, you must ask yourselves do the facts as you find them satisfy you beyond reasonable doubt that the accused is guilty? You must do this, because the onus is on the Crown to prove each element of each charge beyond reasonable doubt, and beyond reasonable doubt means what it says. Therefore, if the facts as you find them satisfy you beyond reasonable doubt that the accused is guilty, it is your duty to say so. If, on the other hand, the facts do not satisfy you beyond reasonable doubt of the accused's guilt, you must return a verdict of not guilty."

It is further to be observed that on each occasion on which the learned Judge gave his direction concerning the doctrine of recent possession, he did it in terms that it was open to the jury to infer. It is plain enough, we think, notwithstanding Mr Lennon's argument to the contrary, that the direction given by the Judge could not reasonably lead the jury to infer that if they did

not accept the explanation given by the accused then they must necessarily find him guilty. Furthermore, time and time again, after having stated the doctrine itself, the learned Judge, in amplification and in dealing with the effect of an explanation given to the jury, said to the jury that if the explanation could be true then the doctrine of recent possession did not apply. The statement that the doctrine of recent possession did not apply may perhaps be said to be an inelegant way of saying to the jury that it would not be open to them to convict on the basis of, the doctrine in that event, but we think it is plain enough to people of commonsense listening to it that that is exactly what the Judge meant. So that in our opinion, the way in which the learned Judge stated the doctrine left the jury in the situation in connection with the application of the doctrine, that if they thought an explanation had been given and it could be true then it was not open to convict the accused on the basis of the doctrine.

The statement of the doctrine of recent possession has been explained in various cases and been put in several ways. A common form is to tell the jury that if the accused gives no explanation, or if they are satisfied that the explanation he has given is untrue, then they may, or it is open to them to convict the accused. In the present case the learned Judge, instead of saying to the jury, "If you are satisfied his explanation is untrue" has really said the co-relative. He has said, "If he has given you an explanation and you think it could be true, then the doctrine does not apply." It is obvious, we think, that if the jury reached a situation where they thought the explanation given by the accused could be true, then they are in the same position as if it had been put the other way, and they had been told that it would apply if they were satisfied that the explanation given was untrue. If it could be true in their view, then they could not be in the position of being satisfied that it was untrue.

In our view, when the Judge's statement, both in his original charge and in his further charge, is looked at as a whole, we are satisfied that the gist of the rule has been correctly stated, and we do not think that any reasonable jury listening to what was said could be left with the impression that it placed any onus of proof upon the applicant other than, if he so chose, to give some explanation which, if the jury thought it could be true, would have the effect of making the doctrine inapplicable.

Furthermore, we are unable to accept the argument that the failure of the Judge at the time that he was dealing with the doctrine of recent possession, to re-state that the ultimate burden of proof rested on the Crown constituted a mis-direction. It is a common thing for judges to repeat the burden of proof rule at this stage, but in the end result, as to have said before, each charge must be read as a whole, and the ultimate question is what was the effect likely to be produced on the jury. Mr Lennon submitted that the jury would be left, or may have been left, in the position of thinking there was some onus of proof upon the accused person, but as we have said, the learned Judge, in the passage to which we have referred, quite plainly and clearly stated the position as to the ultimate burden of proof. In so stating that burden, he did so in relation to the ultimate matters that had to be proved; namely, the guilt of the accused on the offences charged. In our view, the jury could not have been left under any misapprehension in view of the direction given by the learned Judge, that they could not find the accused guilty of any of these charges unless they were satisfied beyond reasonable doubt in the ultimate that he was guilty of the offences charged.

We should perhaps say, in connection with the effect of the direction given by the learned Judge as to the application of the doctrine of recent possession, that not only did neither counsel appearing for the accused persons object to the way in which the learned Judge stated the rule, but on the contrary, after the further direction had been given, each counsel urged the learned judge not to give any further directions submitting to him that what he had said about the doctrine was sufficient. At page 697 of the transcript, after the learned Crown Prosecutor had submitted that the learned Judge might give a further direction on the doctrine of recent possession and point out to the jury it was not necessary for the articles the subject of the charges to be actually found in the possession of the accused persons, counsel for the co-accused said to the learned Judge, "Your Honor has made it perfectly clear in his charge as to the law", and counsel then appearing for the applicant said "It would be my submission that Your Honor ought not to give any more on the doctrine of recent possession."

It is perfectly clear from that that the legal representatives appearing at the trials from

what they heard of the charge to the jury, did not take the view that anything said by the learned Judge would be apt to mislead the jury as to the burden of proof or as to what was involved in the doctrine of recent possession. It is not, of course, fatal that an objection has not been taken but as we have said when the ultimate question is really one as to what the effect would be on a jury listening to the charge, there is significance in the fact that people skilled in the law and legally trained have not at the time especially when the charge has been repeated twice by the learned Judge seen fit to say that there is any exception to be taken, but on the contrary, have urged upon the learned Judge that what he said was correct and that no further direction should be given.

For these reasons, we are unable to uphold the second ground of appeal.

The third and final ground argued was:

> "That the learned Judge by his conduct of the trial precluded the applicant from receiving a fair trial."

Under this ground of appeal, Mr Lennon took the Court through certain portions of the learned Judge's charge which he said contained some mis-statements of the effect of certain portions of the evidence that had been given. Mr Lennon then referred in some detail to the evidence that was given at the trial by the applicant. Very lengthy evidence was given and what Mr Lennon was pointing out was that from the very early stages in the examination-in-chief but his counsel of the applicant, the learned Judge was interposing and asking questions himself. Mr Lennon pointed out that although a number of those questions was obviously designed to extract further relevant information or clarify answers that had been given, on a number of occasions questions were asked by the learned Judge that partook of the nature of a cross-examination.

We think there is substance in some of the comments that Mr Lennon made, and we think it would have been better if the learned Judge had not asked a number of the questions he did ask, but left those questions to be asked either by counsel for the applicant or by counsel for the Crown in cross-examination.

The question is, however, in the ultimate resort, whether the questioning by the learned Judge is or was of such a degree as to require an appellate Court to conclude that there had been such a departure from the due and regular process of justice as to require a new trial. In support of the argument Mr Lennon submitted that by the extent and the nature of the questioning, particularly, as we have said, of the applicant in his examination-in-chief, the learned Judge prevented the presentation of the defence of the applicant in a full and coherent manner, and that the learned Judge in so doing had indicated his own view to the jury of the guilt of the applicant, or had certainly indicated his view that the applicant was not trustworthy as a witness, and had done so in such a way as to be likely to prejudice the jury.

Questions of this kind have arisen before, and we have been referred to several cases in which the principles applicable have been discussed. There were two cases in recent years in this Court, *R v Delaney* [1955] VicLawRp 8; [1955] VLR 47; [1955] ALR 45 and more particularly the case of *R v Mawson* [1967] VicRp 23; (1967) VR 205, where the principles were examined. We were also referred by Mr Moloney for the Crown to the decision of the English Court of Criminal Appeal in *R v Cain* (1936) 25 Cr App R 204. In some respects the case of *Cain* bears a resemblance to the problem that is presented to this Court.

In giving the decision in that case, Du Parcq J, as he then was, pointed out that the learned Judge had quite properly asked a number of questions and said:

> "There is no reason why the Judge should not from time to time interpose such questions as seem to him fair and proper."

He then proceeded:

> "It was, however, undesirable in this case that, beginning in the way which I have described the Judge should proceed, without giving much opportunity to counsel for the defence to interpose, and long before the time had arrived for cross-examination, to cross-examine Chatt"

— one of the witnesses —

> "with some severity. The Court agrees with the contention that that was an unfortunate method of conducting the case. It is undesirable that during an examination-in-chief the Judge should appear to be not so much assisting the defence as throwing his weight on the side of the prosecution by cross-examining a prisoner. It is obviously undesirable that the examination by his counsel of a witness who is himself accused should be constantly interrupted by cross-examination from the Bench. Cross-examination in cases of this kind is usually quite efficiently conducted by counsel for the Crown. At the same time although it is quite right that this criticism should have been made in this case,"

likewise, we repeat, here properly Mr Lennon raised the criticism in the present case,

> "we cannot find the slightest reason for thinking that the result would have been otherwise if this course had not been taken by the Common Serjeant. It is right to say, looking at the summing up as a whole that it was perfectly fair, and it is right also to say that the Common Serjeant told the jury that they might disregard any view he might have appeared to have taken of the case because the facts were a matter for them. In these circumstances it is impossible to say that there are grounds for interfering with the conviction."

In the present case, notwithstanding the interruption by way of questioning by the learned Judge, it is apparent from a perusal of the transcript that the applicant was given full opportunity to state fully and by the aid of his counsel and in examination-in-chief the defence he was putting forward to the jury. It is also clear, and indeed the contrary was not argued and it could not be, that in his charge to the jury the learned Judge fully and fairly put the defence of the applicant to the jury.

It should also be said that in the course of his charge the learned Judge gave a direction in conventional terms concerning the respective functions of Judge and jury, and made it perfectly plain to the jury that any view of the facts he might express was not binding upon them, and that they were the ultimate judges of the facts, and that all the facts were a matter for them.

Furthermore, it is again not without significance that no objection was taken by counsel to the questioning by the learned Judge. So far as the suggested mis-statements of evidence are concerned, they were, we think, of no great significance in themselves, and as has been said on many occasions before where it is a question of mis-statement of the evidence, it must be remembered that the jury have heard the evidence for themselves, and a mis-statement of the evidence by the judge, particularly where he is not asked to correct it at the conclusion of his charge, will not vitiate a verdict except in very exceptional circumstances where it is plain that a miscarriage of justice has resulted.

In the end result, therefore, it becomes a question of degree where objections to a charge or to the conduct of a trial are taken on this ground, and the Court must in the end ask itself, looking at the conduct of the trial as a whole, and having regard to the summing up given by the learned Judge, and to the attitude that had been taken by counsel for the participants in the trial, is the Court satisfied that there has been interference by the learned Judge to such a degree that the Court is satisfied that there may have been a miscarriage of justice produced.

As we have said, here the applicant was not denied a full opportunity of stating his evidence as fully as he desired. The learned Judge again put the defence fully to the jury, and indeed in a fair and dispassionate meaner. It is not said here, and it could not be said with any validity, that the learned Judge had disclosed any bias or antipathy to the applicant in the course of his charge to the jury and having regard to his direction that any view of the facts that he might put was not binding on the jury, we are not by any means satisfied that here the conduct of the trial Judge was such as to have been likely to produce any miscarriage of justice.

The third ground of appeal therefore must fail. The result is that the application against conviction will be refused.