40/03; [2003] VSC 501

SUPREME COURT OF VICTORIA

DPP v BODOULOH and ANOR

Warren CJ

27 October, 19 December 2003 — (2003) 144 A Crim R 37

CRIMINAL LAW – HANDLING STOLEN GOODS – POSSESSION OF PROPERTY REASONABLY SUSPECTED OF BEING THE PROCEEDS OF CRIME – OWNERS OF MILKBAR FOUND TO BE IN POSSESSION OF A LARGE QUANTITY OF PACKETS OF CIGARETTES – RECENT BURGLARY IN THE REGION INVOLVING THEFT OF A LARGE QUANTITY OF CIGARETTES – MILKBAR OWNERS CHARGED WITH OFFENCES INVOLVING CIGARETTES FOUND IN THEIR MILKBAR – AT HEARING POLICE OFFICERS NOT PERMITTED TO GIVE EVIDENCE ABOUT THE RECENT BURGLARY – MAGISTRATE FINDING THAT THE RELEVANT SUSPICION MUST BE FORMED BY POLICE OFFICER WHEN DEFENDANT FOUND TO BE IN POSSESSION OF THE PROPERTY – "MAY REASONABLY BE SUSPECTED" – MEANING OF – CHARGES DISMISSED – WHETHER MAGISTRATE IN ERROR: *CONFISCATION ACT* 1997, S123; *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. …"

B. were the proprietors of a milkbar and mixed business. They were found by police to have on their premises a large quantity of packets of cigarettes mostly in the form of loose packets. After the seizure of the cigarettes police located fingerprints on three of the packets belonging to a person who was involved in a burglary upon a supermarket in the area in which a large quantity of cigarettes were stolen. B. were charged with offences of handling stolen goods and possessing property reasonably suspected of being proceeds of crime. At the hearing, the magistrate determined that the relevant suspicion was required to be formed by the police informant at the time B. were found to be in possession of the property and that the test to be applied was an objective test rather than a subjective test. On this basis, the magistrate ruled certain evidence to be inadmissible and ultimately upheld a 'no case' submission and dismissed the charges. Upon appeal—

HELD: Appeal upheld. Decision set aside and remitted to the magistrate for rehearing and determination according to law.

1. Section 123 of the Act does not specify the person who is to form the subject suspicion; however, in light of the onus that lies with the prosecution it seems clear that it will usually be the suspicion, if any, of the investigating officer. Section 123 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. The difference between this provision and s26 of the *Summary Offences Act* 1966 is important. The latter required the formation of a reasonable suspicion at a particular point in time. The former, the *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. Section 123 of the Act cannot be construed in a constrained manner. 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. Accordingly, the magistrate was in error in deciding that the suspicion must be formed by the Informant at the time B. were found in possession of the property.

2. Because of the rulings by the magistrate on the admissibility of evidence, it was impossible for him to apply the test formulated in the authorities. By not permitting the informant and other police officers to give evidence, the Magistrate rendered it impossible for him to make the necessary findings of fact as to suspicion. Accordingly, the Magistrate was in error in not permitting the informant and other police officers to give evidence that they were aware of a recent burglary involving the theft of certain brands of tobacco products.

[Ed note: cf *DPP v Pastras* [2005] VSC 59; (2005) 11 VR 449; (2005) 152 A Crim R 234; MC01/05]

WARREN CJ:

1. The respondents were jointly tried on three charges of handling stolen goods contrary to

s88(1) of the *Crimes Act* 1958 and three charges of possessing property reasonably suspected of being proceeds of crime in breach of s123 of the *Confiscation Act* 1997.

2. The charges were heard summarily in the Magistrates' Court sitting at Sunshine. The presiding magistrate ruled certain evidence for the informant as inadmissible and, ultimately, upheld a no-case submission. The charges against both respondents were dismissed on 28 May 2003. The Director of Public Prosecutions appealed against the decisions below pursuant to s92 of the *Magistrates' Court Act* 1989 on questions of law.

The Background Facts

3. The respondents were the proprietors of a milkbar and mixed business at 212C Victoria Street, Altona Meadows. They were found by the police to have on their premises a quantity of packets of cigarettes mostly in the form of loose packets. Initially the police were alerted to the presence of the cigarettes by one David White and one Gregory Towns employees of tobacco wholesalers. Apparently, the wholesalers usually sold cigarettes to the respondents for the purposes of their milkbar business. The wholesalers alleged to the police that the respondents enquired of them whether they could swap for other brands of cigarettes a large quantity of packets of cigarettes that they had purchased from a relative. The police were investigating the theft of a quantity of cigarettes from a supermarket.

4. As a result, the police, under warrant, searched the premises of the respondents and seized a large quantity of packets of cigarettes, all up about 3,000 packets. The search was conducted on 2 November 2000. Mostly the packets of cigarettes were in bundles bound by rubber bands. There were about 29 cartons of cigarettes found by the police in addition to the loose packets. The cigarettes were found in various locations on the premises and were not grouped together or sorted by way of brand. When the police executed the search warrant, the two tobacco wholesaler employees, Messrs White and Towns were present. The police also seized some documents that related to purchases of cigarette stock by the respondents from three tobacco companies and a local supermarket. The documents did not account for the cigarette stock seized by the police. The records also indicated that since the respondents acquired the milkbar and mixed business the purchases from tobacco suppliers had dramatically decreased while retail sales had remained constant.

5. When the respondents were interviewed by the police they stated that in addition to their suppliers identified from the seized invoice documents, they had purchased stock from several retail tobacconists and from a relative whose shop had closed down. The nominated retail tobacconists provided a statement to the police who had no or little recollection of the respondents. The identity of the alleged relative of the respondents was not revealed to the police.

6. Furthermore, after the execution of the search warrant and the seizure of the cigarettes and the documents the police conducted fingerprinting tests of the seized packets of cigarettes. On three of the seized packets of cigarettes the police located fingerprints that were identified as being those of one Jarrod Jones.

7. On 8 February 2001 Jones was arrested and later charged by the police in respect of numerous burglaries including a burglary upon an IGA supermarket at 46 Alma Avenue, Altona Meadows on 25 October 2000 in which $11,400 worth of cigarettes were stolen. Jones did not make any admissions in his record of interview. Later, he allegedly volunteered to the police information that he and another person had taken stolen cigarettes to the respondents and received payment of $7 per packet of cigarettes provided. Jones was convicted in the County Court at Melbourne on 21 May 2003 in relation to numerous burglaries and sentenced to a term of imprisonment.

8. Subsequently, the police charged the respondents with the subject charges of handling stolen goods and possessing property reasonably suspected of being proceeds of crime.

9. The facts already described were included in the police brief.

The Hearing Below

10. The charges against the respondents were heard in the Magistrates' Court at Sunshine commencing on 26 May 2003 and continuing over three days between 26 and 28 May 2003. The respondents pleaded not guilty to all charges.

11. The two tobacco wholesale employees, Messrs White and Towns were called to give evidence for the informant of their attendance at the respondents' premises and the offer to swap a large quantity of unsold cigarettes. Evidence by Messrs White and Towns of the reasons for forming a suspicion that the cigarettes were stolen or illegally obtained was objected to and ruled inadmissible. The evidence of the two witnesses was confined to their observations of the subject stock, namely, the quantity and presentation of the stock and their observations of the search by the police.

12. The informant also called Jarrod Jones to give evidence. Initially he was reluctant to do so. However, he gave evidence that he had committed a series of burglaries and stolen cigarettes that he sold in turn to people he met on the street. He said he could not remember to whom he had sold the cigarettes. He said he could not remember a conversation with a police officer in which he was alleged to have stated that he sold stolen cigarettes to the respondents. There seemed to be some argument below about the calling of Jones and whether he would be declared a hostile witness. Eventually, his evidence was limited to that described.

13. The police officers involved in the search and seizure on 2 November 2000 were called and gave evidence of events as earlier described. Upon objection the magistrate ruled inadmissible any evidence by the police officers as to their reasons for forming a suspicion that the cigarettes were stolen or illegally obtained. Evidence was led by Detective Senior Constable Paul Lloyd concerning his investigation of a series of burglaries including the burglary upon the particular IGA supermarket and the charging and conviction of Jones. Members of the police fingerprint section gave evidence that the fingerprints found on three of the packets of cigarettes seized from the respondents were identified as those of Jones.

14. The Director relied upon the affidavit of Adrian Mark Castle, a solicitor of the Office of Public Prosecutions, that set out a description of the hearing below and exhibited a transcript of the court recording. The quality of the transcript, presumably because of recording difficulties, was poor and in some sections almost impossible to follow. There were also gaps in the evidence as transcribed. These difficulties on the appeal were compounded by the paucity of articulated reasons and formal rulings by the magistrate. In any event, conversations between the tobacco wholesaler employees, Messrs White and Towns and the police seems to have been excluded. The two witnesses seem to have been largely confined in their evidence as to their attendance at the respondent's premises in order to swap cigarettes, what they saw at the respondents' premises, that is, the volume, location and storage of cigarettes, the types of brands and value of cigarettes and what they saw during the police search and seizure on 2 November 2000. It seemed that the magistrate determined that a suspicion was required to be formed by the informant or a relevant member of the police force at the time that person was found to be in the possession of the subject property and to have determined that the test to be applied is an objective test and not a subjective test. On these bases the magistrate seems to have made the rulings he did as to the inadmissibility of the evidence as described.

15. Furthermore, the magistrate appeared to exclude evidence of police officers as to their individual observations at the time of the execution of the search warrant, again, on the basis that reasonable suspicion was an objective test rather than a subjective test. In addition, the magistrate seems to have determined that the state of mind of the individual police officers was irrelevant. The magistrate seems, also, to have excluded evidence as to the formation of a suspicion by the particular police officers on the ground of hearsay. Thus, the magistrate excluded as irrelevant evidence by Senior Constable Pengelly as to how he came to be aware of the theft of cigarettes from the IGA supermarket including evidence of a conversation between him and another police detective. The magistrate excluded the evidence of Mr Pengelly as irrelevant. It seemed that the informant purported to rely upon the evidence of the police officers that was eventually excluded to establish the existence of the suspicion in the minds of the police officers at the time of executing the search warrant.

16. At the close of the informant's case a no case submission was made on behalf of the respondents to the effect that the charges had not been proved. The submission was upheld and all charges were dismissed. The reasons of the magistrate with respect to the rulings on both the evidence and the no case submission were perfunctory. The reasons for upholding the no case submission seemed to be twofold. The magistrate held that the relevant suspicion for the purposes of the statute had to be in the mind of the policeman and that the suspicion that the

property so possessed is the proceeds of crime must exist at the same time as the possession of that property.

The Appeal

17. The Director of Public Prosecutions appealed pursuant to s92 of the *Magistrates' Court Act*. The questions of law are:

> (i) did the Magistrate err in law in holding that the suspicion that the property found in the Defendant's possession is the proceeds of crime must be formed by the Informant or a relevant member of the police force at the time the Defendant was found to be in the possession of such property?
>
> (ii) if yes, did the Magistrate err in law when he did not permit the Informant and other police officers to give evidence that they were aware of a recent burglary involving the theft of certain brands of tobacco products before they attended at the Defendant's premises which had occurred in the relevant region and at a relevant time, this being a matter which formed part of the knowledge of the Informant and other police officers when forming a suspicion that the goods concerned were proceeds of crime?
>
> (iii) when considering submissions on behalf of the Defendants that there was no case to answer, did the Magistrate err in law in not including in his considerations the evidence subsequently obtained by the police which confirmed that at least part of the goods concerned had been stolen property?

18. Ms Judd for the Director did not agitate that the first and second questions be treated as interdependent, rather, that they be treated as discrete questions and that the words "if yes" at the commencement of question 2 be disregarded. Initially, there was an objection on behalf of the respondents to this course. However, the objection was not pursued on the basis that the respondents were given every opportunity to address the court on the matter and there was no disadvantage in treating the questions as separate. The same three questions of law were formulated for both of the respondents.

The Legislation

19. Section 123 of the *Confiscation Act* provides:

> "**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) or a level 7 fine (2450 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."

20. The *Confiscation Act* did not repeal s26 of the *Summary Offences Act* although in the second reading to the speech the Attorney-General described the Bill as including the key objective "... to improve the operation of existing provisions to enable law enforcement authorities to more readily identify, track and confiscate proceeds of crime ... ."[1]

21. Section 26 of the *Summary Offences Act* provides:

> "**26. *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 e deemed to be in his actual possession.
>
> (4) Where a person is charged before the 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."

Legal Principles

22. I was referred to a number of authorities.

23. In *Tatchell v Lovett*[2] the appellant was charged with having in his possession a quantity of items suspected of being stolen. Hood J held that the object of the relevant legislation[3] was to provide for the immediate arrest *flagrante delicto* of suspected persons in possession of, or conveying in any way property supposed to have been stolen. It was held that as the defendant was never in actual possession of the subject property at any time (notwithstanding that the property was found on his premises, but he being absent at the particular time).

24. In *Moors v Burke*[4] the High Court held that for the purposes of the statute[5] "actual possession" of property does not occur unless the person has "complete present personal physical control of the property, to the exclusion of others who are not acting in concert with him, either by having the property in his present manual custody or by having it where he alone, to the exclusion of such others, has the right or power to place his hands on it and so to have manual custody when he wishes."[6] In *Moors'* case the defendant was a Customs Officer and found to have a quantity of wool in a locker on the wharfs. The High Court held that when the wool was placed in the locker by the defendant it ceased to be in his actual possession because the locker did not belong to him nor was it under his control that circumstances does not arise here.

25. In *McPherson v Goldstone*[7] the defendant was found with cases of milk. The only issue with which the Full Court was concerned was whether the suspicion of the milk being stolen existed while the defendant was in possession of the milk. The Full Court held that the suspicion of the property being stolen existed while the accused was in possession of the property was not established and a conviction below was quashed.

26. In *Olholm v Clink*[8] the police found a quantity of kerosene suspected of having been stolen on property occupied by the defendant and his wife. The defendant gave two different and inconsistent statements as to how he came by the kerosene. McArthur J held that the two different statements made by the defendant amounted to some evidence that grounded a reasonable suspicion that the kerosene was stolen. It was further held unnecessary that at the time when the goods were first found in the possession of a defendant there should be reasonable grounds for suspicion. It was held to be sufficient if at some time later, the goods still being in the defendant's actual possession (being the time at which he was charged with having them in his actual possession) they are suspected on reasonable grounds of having been stolen.

27. In *ex-parte Miller; re Hamilton and Another*[9] a charge was laid against a defendant for having wool and fleece in his custody reasonably suspected of being stolen. The defendant was intercepted in a truck carrying certain bags by the police. Upon questioning by the police the defendant was requested to take the bags to the police station. After inspection at a later time at the police station the defendant was charged with having in his possession goods reasonably suspected of being stolen. Street J held[10] that the fact that the wool was taken and temporarily detained by the police at the police station while they made inquiries did not amount to the defendant parting with the possession of the wool.

28. In *Pendlebury v Kakouris*[11] the police during a search of premises rented by the defendant and her husband located a locked trunk and when it was opened it was found to contain property that the informant suspected of being stolen or unlawfully obtained. At a hearing in the Magistrate's Court a submission was upheld that at the time the informant saw the property in the trunk and formed his suspicion the property was not in the possession of the defendant. The Magistrate below dismissed the information. Upon the return of an order *nisi* McInerney J after a thorough review of the authorities observed[12] that much depends upon the circumstances in which the claim of ownership of subject property is made. McInerney J held[13]:

> "As I understand it, the magistrate has taken the view that the defendant, in giving the key of the trunk to the police, thereby surrendered possession of trunk and of its contents to the police. I do not think that this conclusion necessarily follows, as a matter of law, from the act of handing over

> the key to the police. Whether or not it follows must depend, I would suppose, on the intention of the defendant in handing over the key. In many cases a person handing over a key in such circumstances would have no intention of surrendering possession of the contents of the trunk or other receptacle but would be reserving and asserting her right to possession of these contents."

29. His Honour held that it was open to the magistrate to find that the fact that the defendant had given the key to the trunk to the police officers in order to open the trunk, she being 'physically at hand', did not necessarily operate to divest the defendant of possession. Accordingly, the order below was set aside.

30. In *Kitchen v Cox*[14] the Court considered a matter arising under s26 of the *Summary Offences Act* where the issue was whether the fact that the defendant was arrested on a theft offence, handcuffed and in a police vehicle was in "actual possession" of property found in his motor vehicle. The magistrate below held that the property was not in the actual possession of the defendant when it was suspected of being stolen because he was under arrest and forcibly detained in a police vehicle. Hedigan J considered the authorities (most of which I have already referred to) and ultimately concluded that the case of possession against the defendant arose solely from his ownership of the motor vehicle and his control of that vehicle (where the subject property was found).[15] His Honour observed[16]:

> "It becomes necessary to look at some cases cited to me in brief compass. The decision of the High Court in *Moors v Burke* [1919] HCA 32; (1919) 26 CLR 265; 25 ALR 213 is fundamental to a proper consideration of the legal matters in this case. Isaacs J had considered statements from F. Pollock and R. S. Wright (1985) on *Possession*. He did this because it was necessary to construe the words contained in the Victorian Act, as it was then and now, that of 'actual possession'. That is arguably possession in fact rather than possession at law. The passages cited from E. Pollock and R. S. Wright involved a consideration of the elements involved, *jurisprudentially* speaking, in possession, the authors identifying the use of 'possession' in relation to moveables is being used in three different senses. The first, to signify mere physical possession, that is, a state of fact; the second, the legal concept involving the capacity of the possessor to 'assume, exercise or resume manual control of it at pleasure', and, finally, so far as regards other persons, that `the thing is under the protection of his personal presence in or on a house or land occupied by him or in some receptacle belonging to him and under his control".

31. Each of these cases was concerned with possession.

32. In *Rinaldi v Watts*[17] Kellam J was concerned with an appeal from the Magistrates' Court involving possession of a rifle and a shotgun reasonably suspected of being proceeds of a crime in breach of s123 of the *Confiscation Act*. Kellam J held[18]:

> " ... 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 contest of s123 of the Act. 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.' 'Forfeiture offence' is defined by s.3 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'. 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. The word 'proceeds' is defined by s.3 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'."

33. Kellam J continued[19]:

> "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.' 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. 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."

34. Kellam J observed, also, that there were a number of other issues raised by the appeal.[20]

"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. 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. It is appropriate for me to observe that I have little doubt that the word `possess' as used in s.123 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] VLR 645. 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. 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. 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."

35. Subsequent to the judgment of Kellam J in *Rinaldi v Watts*, the matter was considered by the Court of Appeal in an application for leave to appeal: see *Rinaldi v Watts*.[21] The application for leave to appeal was refused. Buchanan JA observed[22]:

"The meaning of the words appearing in s123 is clear. In ordinary parlance, property which is acquired as a result of the commission of a crime is properly described as the proceeds of the crime or derived or realised from the commission of the crime. To limit the words of the section and the definition of 'proceeds' to property that has been converted from the form it took at the time of the commission of the crime is to strain the language which Parliament has employed. Is that straining of language required because s123 is found in a Part of the Act entitled 'Money Laundering' or because the provision of another Act, s26 of the *Summary Offences Act* 1966, also catches a person in possession of property reasonably suspected of being stolen or unlawfully obtained? I think not.

> In my view, neither circumstance unequivocally to the conclusion that Parliament intended s123 to be confined in the manner contended for by the applicant."

36. On the basis of the decision of *Tatchell v Lovett* and, further, the judgement of Kellam J in *Rinaldi v Watts,* the magistrate in the present case held that a reasonable suspicion determined on an objective basis must be in the mind of the relevant police officer at the particular time. It was held, further, that the police cannot seize the goods in order to obtain further evidence so as to mount further or sufficient evidence to support a suspicion. In other words, the suspicion must be held at the time the police, in the present case, seized the cigarettes from the respondents and took them away from the respondents' premises.

37. I was referred, also, to other authorities concerned with the topic of suspicion and belief but in the context of investigation as distinct from the commission of a specific criminal offence.

38. In *George v Rockett and Another*[23] the High Court was concerned with a provision of the Queensland Criminal Code[24].

39. The provision related to the necessary requirements about which a justice should be satisfied for the issue of a warrant. In the judgment of the Court it was held[25]:

> "When a statute prescribes that there must be 'reasonable grounds' for a state of mind – including suspicion and belief – it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person . . . Therefore it must appear to the issuing justice, not merely to the person seeking the search warrant, that reasonable grounds for the relevant suspicion and belief exist."

40. In *Walsh v Loughnan*[26] the Court considered a provision enabling the taking of a blood sample for the purpose of DNA profiling.[27] Vincent J held that the Magistrate must be satisfied only that reasonable grounds exist. His Honour observed[28]:

> "The questions to be determined by the learned Magistrate were not to be resolved by reference to the Rules of Evidence or by the application of a test related to the balance of probability. In the process of investigation it is by no means uncommon for information to be obtained which would not be admissible in a court of law, or for well-founded suspicions and beliefs to be developed on the basis of a variety of pieces and types of information, including evidence of consistency or inconsistency of conduct, which could not be advanced as proof of the facts outlined or expected to exist."

41. It has been held that the relevant police officer must entertain the subject suspicion or belief: see *George v Rockett*;[29] also *Walsh v Loughnan.*[30] It is also clearly established that there must be facts in existence which are sufficient to induce the relevant state of mind, namely the suspicion, in a reasonable person: see *George v Rockett*; *Walsh v Loughnan.*[31] "Suspicion" can be as little as conjecture or surmise and be less than that which is required for proof or belief: see *George v Rockett*;[32] *Olholm v Clink.*[33] Indeed, suspicion may be based upon a variety of information, including hearsay: see *Walsh v Loughnan.*[34]

42. In this case it was argued for the Director that because of the earlier rulings by the magistrate on the admissibility of evidence it was impossible for him to apply the test formulated in the authorities. In addition, it was submitted for the director that the magistrate incorrectly confined himself to four matters that he regarded as relevant. They were, first, the fact that the cigarettes were located on shelving in large quantities; secondly, that large numbers were bundled up in rubber bands and not stored in cartons; thirdly, that there were 29 cartons of cigarettes compared with 1,811 packets of cigarettes outside cartons; and fourthly, the fact that on each shelf there were various brands of cigarettes.

43. The real issue on the appeal was whether the test to be applied was an objective test or a subjective test. The Director, in effect, argued that the test was a subjective one. Mr Mason who appeared for the respondents argued that the proper test was an objective one. Reliance was placed upon some of the authorities concerned with s26 of the *Summary Offences Act* on the basis of observations made by Kellam J in *Rinaldi v Watts.*[35] It was submitted for the respondents that s26 of the S*ummary Offences Act* was required to be strictly construed because it is a penal provision: see *Kitchen v Cox.*[36] Hence, it was argued that the same principle applied to s123 of the *Confiscation Act.* Neither section specifies the person who is to form the subject suspicion.

However, in light of the onus that lies with the prosecution it seems clear that it will usually be the suspicion, if any, of the investigating officer: see *Willis v Burnes*.[37] In that case it was held that the onus is on the prosecution at the outset to establish that the subject goods might be "reasonably suspected of having been stolen". It was the requirement of reasonableness that provided the foundation to a submission for the respondents that the proper test is an objective test: see also *R v Madden*.[38]

44. In considering the approach to s26 of the *Summary Offences Act*, Smith J in *Nicholls v Young*[39] observed that four elements of the concept of "reasonable suspicion" were well established. His Honour said[40]:

> "First, the reasonable suspicion had to be entertained at the time the persons were in possession of the property in question. Secondly, the reasonable suspicion must attach to the property and not merely to the person in possession. Thirdly, the suspicion must be entertained upon reasonable grounds. Fourthly, the mere fact that a man makes an untrue statement as to how he came into possession of stolen goods when questioned is not in itself a ground for believing them to be stolen."

45. I accept the submissions on behalf of the Director in two respects. First, it is apparent from the authorities that the test is subjective in the sense that it must appear to the informant that reasonable grounds exist to support the suspicion and the belief. The suspicion in this case was open at the time of the search but it was augmented, even bolstered, after the search. In this respect the Magistrate was in error. However, the second basis for accepting the submissions of the Director is the more significant in this case. By not permitting the informant and other police officers to give evidence, the Magistrate rendered it impossible for him to make the necessary findings of fact as to suspicion. It follows, therefore, that I consider the first two questions of the appeal are answered in the affirmative and that the appeal should succeed. It is unnecessary for me to answer the third question.

46. There are additional aspects of the legislation from a construction perspective that support my view as to the formation of the suspicion.

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, s123 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 "<u>that may</u> 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 "<u>may</u> 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 s123 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.

51. I answer the question, therefore, postulated by the appeal, as follows:
(i) Yes. (ii) Yes. (iii) Unnecessary to answer.

52. For these reasons I would allow the appeal and set aside the decision of the magistrate below. I would direct that the matter be remitted for re-hearing and determination in accordance with law.

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[1] Second Reading Speech, Legislative Assembly, 13 November 1997, *Hansard* p1146.
[2] [1908] VicLawRp 91; [1908] VLR 645; 14 ALR 540; 30 ALT 88.
[3] Section 10 of the *Police Offences Act 1907*.
[4] [1919] HCA 32; (1919) 26 CLR 265; 25 ALR 213.
[5] Section 40 of the *Police Offences Act 1915*.
[6] At 274.
[7] [1920] VicLawRp 66; (1920) VLR 331.
[8] [1923] VicLawRp 69; [1923] VLR 556; 28 ALR 421; 44 ALT 87.
[9] (1934) 51 NSW WN 23.
[10] At 24.
[11] [1971] VicRp 20; (1971) VR 177.
[12] At 192.
[13] At 193.
[14] (1996) 85 A Crim R 328.
[15] At 335.
[16] At 332.
[17] Ibid.
[18] Ibid, at paras [9] - [13].
[19] At paras [21] - [23].
[20] At paras [26] - [30].
[21] Unreported judgment of the Court of Appeal, 14 March 2003 per Buchanan and Vincent JJ A.
[22] At para [5].
[23] [1990] HCA 26; (1990) 170 CLR 104; 93 ALR 483; 64 ALJR 384; 48 A Crim R 246.
[24] Section 679 of the *Criminal Code* (Qld).
[25] At 112.
[26] [1991] VicRp 75; [1991] 2 VR 351.
[27] Section 464U of the *Crimes Act* 1958.
[28] At 357.
[29] [1990] HCA 26; (1990) 170 CLR 104, 111; 93 ALR 483; 64 ALJR 384; 48 A Crim R 246.
[30] [1991] VicRp 75; [1991] 2 VR 351.
[31] Ibid.
[32] Ibid.
[33] [1923] VicLawRp 69; [1923] VLR 556; 28 ALR 421; 44 ALT 87.
[34] [1991] VicRp 75; [1991] 2 VR 351, 357.
[35] [2003] VSC 2 [8]; 138 A Crim R 456.
[36] (1996) 85 A Crim R 328.
[37] [1921] HCA 43; (1921) 29 CLR 511.
[38] (1996) 85 A Crim R 367, 368.
[39] [1992] VicRp 62; [1992] 2 VR 209.
[40] At 215.

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