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SUPREME COURT OF VICTORIA — FULL COURT

ROWE v GALVIN; McKEOWN v HILL

Starke, Kaye and Southwell JJ

26 September 1983 — [1984] VicRp 26; [1984) VR 350

CRIMINAL LAW – POSSESSION OF STOLEN PROPERTY – ACTUAL POSSESSION – PROPERTY HANDED TO CONSTABLE – WHETHER STILL IN ACTUAL POSSESSION OR POSSESSION ABANDONED – PROPERTY IN MOTOR VEHICLE – WHETHER DRIVER IN POSSESSION: *SUMMARY OFFENCES ACT* 1966, S26.

G. was a passenger in a motor car driven by H. When the car was intercepted by police, it was observed that H had been sitting on a small newspaper packet. When H. was escorted to the police station, G. took possession of the packet and put it in her handbag. When C. was questioned about the whereabouts of the packet, she handed it to the constable who inspected it and found that the packet contained $9000 in banknotes. Both C. and H. were charged with the unlawful possession of the bank notes. The magistrate held that there was no case to answer. Upon order nisi to review—

HELD: Order discharged in respect of Hill. Order absolute in respect of Galvin.
1. The voluntary handing over of property for inspection by a police officer, does not amount to abandonment of possession, so as to enable the person dispossessed to argue that the suspicion of the police officer and the actual possession did not co-exist.
***Ex Parte Miller: Re Hamilton & Anor* (1934) 51 WN (NSW) 105, applied.**

2. If the packet had remained on the seat of the motor car, the driver would have been in possession of it. However, as the passenger took possession of the packet when she alighted from the motor car, then the driver was not in actual possession.

STARKE J: *[After setting out the facts, the grounds of the order nisi, and the relevant terms of s26 of the* Summary Offences Act *1966, His Honour continued]:* ... **[8]** The legislation has been amended in various ways over the years and the word "actual" occurring in s26(1) was introduced into the Act in 1912. There have been, both in this State and in other States where legislation is not always identical, a large number of cases decided in respect of this particular piece of legislation. It appears that its roots were based on the desirability of allowing the police, when they came upon a person *flagrante delicto*, to have an immediate right of arrest rather than swearing out a warrant for the arrest of the suspect.

I am relieved of having to canvass both the history of this legislation and of the numerous authorities in respect of it because of the decision of McInerney J in *Pendlebury v Kakouris* (1971) VR 177. In that case the learned Judge exhaustively investigated the history of the legislation and the authorities on the construction of the section, and I need do no more than refer to it and gratefully adopt it as the basis for this decision. The law on the application of this section stems back basically to a decision of the High Court of Australia in *Moors v Burke* [1919] HCA 32; (1919) 26 CLR 265; 25 ALR 213. The judgment of the Court was delivered by Isaacs J who said at CLR pp273-4:

> "That case stood unchallenged until 1912, when the *Police Offences Act* of that year was passed. It is intituled An Act to amend and consolidate the law relating to Police Offences.' And it does amend the enactment now under consideration by inserting the word 'actual' three times before the word 'possession', and by inserting a provision as to summoning the accused as an alternative to arresting him. It is clear that Parliament inserted the word 'actual' as a definite legislative declaration that the 'possession' which is to bring about criminal consequences entailing possibly twelve months' imprisonment is to be no mere legal conception based on real property distinction, but a plain fact personal to the accused."

[9] Lower down on page 274 he says:

"Having actual 'possession' means, in this enactment, simply having at the time, in actual fact and

> without the necessity of taking any further step, the complete present personal physical control of the property to the exclusion of others not acting in concert with the accused, and whether he has that control by having the property in his present manual custody when he wishes."

The following year the Full Court of this Court, in *McPherson v Goldstone* [1920] VicLawRp 66; (1920) VLR 331 held that the suspicion and the actual possession of the goods the subject matter of the charge must co-exist. The judgment of the Court is given by Cussen J. There are, as I have said, a large number of authorities in respect of this piece of legislation, but most of them are merely applications of the principles I have already mentioned to particular facts, and many of them are not helpful in solving the problem that is now before the Court.

There is one New South Wales decision, however, to which I desire to refer, and that is the case of *Ex parte Miller; Re Hamilton and Another* 51 WN (NSW) 105. It came firstly before Street J. The facts were that whilst driving a lorry on which were loaded bags of wool, M. was accosted by the police and questioned as to the ownership of the contents of the bags. His replies being regarded as unsatisfactory, the bags were taken from M's custody and placed in a shed at the police station. As a result of enquiries M. was charged under s27 of the *Police Offences Act*, 1901, as amended, with having in his custody certain bags of wool reasonably suspected of being stolen and he vas convicted. Street J held that where there is a mere taking of possession **[10]** of goods by the police in order to test whether a reasonable suspicion may not arise upon the facts, there is no such abandonment of possession as to enable the person dispossessed to set up an argument that the suspicion and the possession did not co-exist.

Otherwise the facts of the case would seem to be on all fours with the facts of the present case. In respect of that matter the learned Judge said:

> "Moreover, the sections in the different State Acts differ to a certain extent e.g., the language of the relevant section of the Victorian Act requires actual possession. In the present case the section refers to the accused's custody of the goods in question and only requires that they may be reasonably suspected of being stolen."

If the learned Judge was not distinguishing the operation of the two Acts by referring to the Victorian legislation, I cannot understand why he introduced it into his judgment. However, it may be a nice question, which I think it is unnecessary to determine, whether the use of the word "custody" instead of "actual possession" really affects the operation of the legislation. The case went on appeal to the Full Court of the Supreme Court of New South Wales, which dealt with it on another basis. However, Jordan CJ, who delivered the opinion of the Court, said this:

> "It is not necessary, therefore, to deal with the matter on the ground on which it was dealt with by his Honour Mr Justice Street; but I do not wish to be regarded as expressing doubt as to the correctness of his Honour's decision."

The indication I think is there that the learned Chief Justice did, *prima facie* at all events, agree with the views expressed by Street J. However that expression is *obiter*. The **[11]** decision of Street J. is certainly a decision at first instance, but having regard to its author who later became Chief Justice of that State it is of weight as far as I am concerned.

Now in the present case in my opinion the matter boils down in Galvin's case to a very simple point. I have already referred to, in general terms, the evidence which was before the learned magistrate. However, when she came into the police station she had with her handbag, and, as I have said, she is asked by the constable this question, "When I left you with your car a short time ago there was a newspaper parcel on the seat where Hill had been sitting and when I got back it had been removed. Where is it?" She said, "In my bag." The constable said, "Can I see it please?" She then took the parcel from her bag and handed it to the constable. He saw that it was a Sydney newspaper, neatly folded and fastened with a rubber band. He asked her what was in it, and she said she did not know. The parcel having been handed to him, he tore a small portion of the paper away and saw that the paper enclosed a large parcel of bank notes. He then said he immediately suspected this to be stolen or unlawfully obtained. Now up to the time that the respondent Galvin handed the parcel containing the notes to the police constable, there can, I think, be no doubt that she was in actual possession of the parcel and the notes within the meaning of the section, and the short point is whether having handed it to the policeman in those

circumstances she abandoned possession or whether this did not as in the case of *Ex parte Miller* (*supra*) amount to abandonment of possession at all.

It is first to be observed that she voluntarily handed over the package to the policeman on his request. What **[12]** the situation might be if he took it from her by force I need not pause to consider. Furthermore, immediately thereafter and in her presence the police officer tore part of the paper away and exposed the notes. It may be argued that in other circumstances the possession would have been abandoned. For instance, it may be suggested perhaps with some force, that if the police officer without her consent left her and went to another room and compared the numbers of the bank notes with numbers of stolen notes that in taking such a step without her consent he may have assumed the control of the notes, and she might be taken to have abandoned possession of them.

But in the circumstances of this case it seems to me to be unreal to suggest that when she voluntarily handed the constable the package of notes, when the only inference to be drawn is that he wished to examine it to see what was in it, and where she up to that moment had been in undoubted actual possession of the notes, in those circumstances she had abandoned possession in my opinion is to strain the language of the section unnecessarily. Accordingly, in her case I am of opinion that there was no abandonment of possession. There having been no other argument put to us as to why the order nisi should be discharged, I am of opinion that in these circumstances it should be made absolute and the matter should be remitted to the magistrate.

Hill's case, however, stands in a very different situation. There can, I think, be no doubt that initially when his car was stopped by the police officers that he was in possession of the package, the package had originally been on the floor of the car, when the police came alongside apparently he put the package on the seat and sat on it, and that he was then taken from the car or got out of the car and went to the **[13]** police station with the police. No doubt if it had remained on the seat he would have been in possession of it, it being his motor car.

However, the package was taken into the possession of Rosemary Galvin and placed in her bag. Whether before she got out of the car it would still have been within the actual possession of Hill may be a question of argument, but once she got out of the car she was in my view in exclusive possession of the money, the parcel containing the money. From that point of time onwards it cannot I think on any basis be suggested that Hill was in actual possession of the package.

Mr Gillard, for the police, expressly disclaimed any suggestion of concert in respect of the package of money and all he contended, as I understood him, was that as it was clearly his money at the time that she put it in her bag and went into the police station the respondent Galvin was holding the money as it were in trust for him. But as Isaacs J said in *Moors v Burke* (*supra*) this is not some nice question of law, it is a matter personal to the respondent, and to suggest that in those circumstances the respondent was in possession, in actual possession, in any sense of that phrase is to me an untenable argument, and accordingly as far as Hill is concerned in my opinion the order nisi should be discharged.

KAYE J: I agree for the reasons which have been expressed by the learned presiding judge that in the matter of Galvin the order nisi should be made absolute and in the matter of Hill the order nisi should be discharged.

BROOKING J: I concur.
