

The Police Offences Ordinance 1912-1965 Section 18 under which the charge was brought is as follows :-

Whosoever being charged before a justice with having in his possession or conveying in any manner anything which may be reasonably suspected of being stolen or unlawfully obtained does not give an account to the satisfaction of such justice how he came by the same shall be liable to a penalty not exceeding Ten pounds or to imprisonment for a term not exceeding three months.

Section 26 which is also relevant is as follows:-

Any constable may stop search and detain any vessel boat or vehicle in or upon which there is reason to suspect that anything stolen or unlawfully obtained may be found and also any person who may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained.

Section 18 was derived from the English Act 2 and 3 Victoria Chapter 71 Section 24 which was in similar terms and Section 26 was taken from Section 66 of the English Act 2 and 3 Victoria Chapter 47 which contained additional and fuller provisions. It was held in the leading case of Hadley v. Perks (1) that Section 24 was supplemental only to Section 66. The latter Section "supposes that a person is found in a public street with property upon him under such circumstances that there is good reason for suspecting that the property has been improperly come by; and that if he were not apprehended at once he might get out of the way and evade detection right away." *ibid.* pp.462-463. When similar legislation was introduced into the Australian States Hadley v. Perks (2) was followed. See in re Frith (3), Tatchell v. Lovett (4), Brown v. Schiffman (5). *Ex parte* Patmoy (6).

In Tatchell v. Lovett (7) Hood J. said "I think that the object of this legislation is to provide for the immediate arrest, *flagrante delicto*, of suspected persons in possession of or conveying in any way personal property supposed to have been stolen". In Brown v. Schiffman (8) it was held that in order to render a person liable to be apprehended under Section 10 of the Victorian Police Offences Act 1907 as being a person having in his possession personal property suspected of being stolen, it was necessary that such a suspicion should exist whilst such person was in possession of such property.

The legislation in the Australian states has been since amended, but in my opinion, the Victorian cases of Tatchell v. Lovett (9) and Brown v. Schiffman (10) provide the proper interpretation of the relevant sections of the Police Offences Ordinance of the Territory.

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- (1) Law Reports 1 Q.B. 444
 - (2) Law Reports 1 Q.B. 444
 - (3) (1896) 17 N.S.W. L.R. 421
 - (4) (1908) V.L.R. 645
 - (5) (1911) V.L.R. 133
 - (6) 44 S.R. N.S.W. 351
 - (7) (1908) V.L.R. 645
 - (8) (1911) V.L.R. 133
 - (9) (1908) V.L.R. 645
 - (10) (1911) V.L.R. 133

The only issue which was argued before me was whether there was evidence upon which the learned Magistrate could have found that the appellant was in possession of the camera on any relevant date. Mr. Luke submitted that the Ordinance required proof of actual possession, and that there was no evidence that the appellant was in possession of the camera at any time when suspicion was shown to have existed. The only argument open to Mr. Gajewicz, for the respondent, was that whilst the camera was in the hands of Grarubu, the camera was in the possession of the appellant. He relied upon Moore v. Burke (11) for the definition of possession, and cited a line of South Australian cases following Moors v. Burke (12).

If this argument succeeded he would then have been required to argue that at that time whilst he was in possession of the camera, presumably when it was taken by the policeman from Grarubu, it had been shown that the camera was suspected of being stolen.

For the meaning of "possession" in Section 18 of the Territory Ordinance, it is useful to refer again to the case of Tatchell v. Lovett (13) where Hood J. had to consider the meaning of "possession" in a similar section in the Victorian Police Offences Act 1907. He considered that such a provision "so materially interfering with liberty, should be strictly construed, and ought, in my opinion, to be confined to cases of persons actually having possession of, or actually conveying in any manner, any personal property about which suspicion may arise." at p. 647.

In 1912 a new Police Offences Act was passed in Victoria. The Victorian Section was amended inter alia by inserting the word "actual" before the word "possession". In Moors v. Burke (14) the High Court considered that this amendment of the Section confirmed the meaning which had been given to the word "possession" by Hood J. Proof was required that the defendant "was in such physical control of the property as in ordinary life would, if unexplained, indicate that he was its possessor." *ibid* page 274. The judgment of the Court then proceeded :-

"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, or by having it where he alone has the exclusive right or power to place his hands on it, and so have manual custody when he wishes. In its nature it corresponds to its companion expression "conveying" which necessarily involves instant personal physical control to the exclusion of others. These two expressions are obviously intended to cover the whole ground of actual personal control - that is, whether the property is kept stationary or is in motion. But it does not include the case of a person who has put the property out of his present manual custody and deposited it in a place where any other person independently of him has an equal right and power of getting it, and so may prevent the first from ever getting manual custody in the future. In that event the property is not in his actual possession;

(11) 26 C.L.R. 265

(12) 26 C.L.R. 265

(13) (1908) V.L.R. 645

(14) 26 C.L.R. 265

it is where he may possibly reduce it again into actual possession, or, on the other hand, where the other person may himself reduce it into his own actual exclusive possession. (at page 274).

As the High Court in the above passage was only expressing more fully the meaning given by Hood J. to the term "possession" in the earlier Act, in my opinion the word "possession" in Section 18 of the Territory Ordinance carries the same meaning as "actual possession" as defined in Moors v. Burke (15).

It thus cannot be contended that when the camera was in the hands of Grarubu it was in the possession of the appellant. Save as against the true owner, Grarubu was a bailee of the camera with permission to use it and thus was alone in possession of it and was entitled to remain in possession of it until a demand for its return was made by the appellant. Ashby v. Tolhurst (16), Tinsley v. Dudley (17), cited Halsbury 3rd Edition "Bailment" page 94. The whole point of the reasoning in Moors v. Burke (18) is that more "constructive" possession by bailees, agents, servants is outside the legislation.

This is sufficient to dispose of the appeal. I express no opinion as to other matters which were not argued, including whether the Territory legislation is to be restricted to cases of possession on the public streets. See ex parte Lisson (19). Appeal allowed, conviction set aside and appellant discharged.

Solicitor for the Crown : S. H. Johnson, Crown Solicitor

Solicitor for the Accused : W. A. Lalor, Public Solicitor

- (15) 26 C.L.R. 265
(16) (1937) 2 K.B. 242 at p. 249
(17) (1951) 2 K.B. 18 at 26.
(18) 26 C.L.R. 265
(19) 2 S.R. N.S.W. 373