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[HIGH COURT OF AUSTRALIA.]

WILLIAMS APPLICANT ;
DEFENDANT,

AND

DOUGLAS RESPONDENT.
COMPLAINANT.

ON APPEAL FROM THE SUPREME COURT OF
WESTERN AUSTRALIA.

*Criminal Law—Possession of gold—Meaning of “possession or control”—Whether
constructive possession sufficient—Gold Buyers Act 1921-1948 (W.A.) (No. 28
of 1921—No.83 of 1948), s. 36.*

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PERTH,
Sept. 8, 15.

Latham C.J.,
Rich,
Dixon and
McTiernan JJ.

Section 36 of the *Gold Buyers Act 1921-1948 (W.A.)* provides that “Any person . . . who has gold or gold matter in his possession or control . . . may be required by . . . any member of the police force . . . to satisfy him that such person came lawfully by the same . . . and if he does not so satisfy such . . . member . . . proceedings for an offence against this Act may be taken against such person upon the information of such . . . member . . . and upon the hearing, unless such person proves to the satisfaction of the magistrate that he honestly came by the same, he shall be convicted of an offence against this Act. The said gold if proved to be or to have been in the possession of the defendant, whether in a building or elsewhere, and whether the possession thereof has been parted with by the defendant before being brought before the said court or not, shall for the purposes of this section be deemed to be in the possession of the defendant.”

W., while staying at an hotel, acknowledged that he owned certain gold bars which were found in a bathroom some distance from his bedroom and which was used by all lodgers on the same floor as W.

Held that the gold bars were in W.’s “possession or control” within the meaning of the section. That expression in the section means *de facto* possession and actual control. *De facto* possession is wider than mere physical custody and will include the case where a thing has been hidden by a person (or by some other person with his knowledge) so that he can take it into

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his physical custody when he wishes and so that others are unlikely to find it except by accident.

Moors v. Burke, (1919) 26 C.L.R. 265, considered.

Application for special leave to appeal from the Supreme Court of Western Australia (Full Court) refused.

APPLICATION for special leave to appeal from the Supreme Court of Western Australia.

At a court of petty sessions at Perth an information was heard whereby Frederick James Douglas charged that Garnett Williams did on 2nd March 1949 at Perth have "gold in his possession or control and when required by Frederick James Douglas a member of the Police Force to satisfy him the said Frederick James Douglas, that the said Garnett Williams, came lawfully by such gold, failed to do so contrary to s. 36 of the *Gold Buyers Act* 1921-1948."

The evidence led for the prosecution established that Williams lived at Cue which is situated some distance from Perth. He arrived in Perth on 1st March 1949 and put up at an hotel. He brought with him three gold bars of bullion weighing about sixty ounces. The complainant, who was a member of the police force, while in company with a police constable, saw Williams in the street at about half-past nine on the following evening. He then told Williams that he had reason to believe that he was dealing in illicit gold. This Williams denied. The complainant asked Williams where he was staying and expressed a desire to search his room, to which Williams raised no objection. The two policemen made a quick search and then left accompanied by Williams. They all returned to the hotel twenty minutes later, the constable and Williams re-entering the room. The complainant searched the hotel bathroom which was some distance from Williams's bedroom and was a bathroom used by all the lodgers with accommodation on the same floor as Williams.

In the bathroom the complainant found a brown paper packet containing three pieces of gold secreted under the bath. On being questioned by the complainant, Williams at first denied all knowledge of the gold but, upon the complainant pointing out the name of Williams's employer upon the paper, Williams said, "Its no use beating about the bush, it's my gold." On being taken to the police station Williams made and signed a statement admitting that he alone was interested in the gold but he refused to say how he came by the gold or to show that he "came lawfully by the same."

At the close of the case for the prosecution, counsel for the defendant, the present applicant, successfully moved that the

charge be dismissed on the ground that at the material time Williams did not have actual possession of the gold or exclusive possession of the place where it was found.

The complainant obtained an order nisi to review on the ground, *inter alia*, that the magistrate was wrong in holding, that, because Williams did not have at the material time actual possession of the gold or exclusive control of the place where it was found, he was not in possession or control of the gold within the meaning of s. 36 of the *Gold Buyers Act* 1921-1948 (W.A.). The Full Court of the Supreme Court made the order absolute and remitted the complaint to the magistrate with a direction that possession or control of the gold had been sufficiently established and that Williams should therefore be called upon to prove to the satisfaction of the magistrate that he honestly came by the gold.

From that decision the defendant, Williams, made application for special leave to appeal to the High Court.

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T. A. Hartrey, for the applicant. When the gold was found it was not in the possession or control of the applicant (*Moors v. Burke* (1); *Treacy v. O'Brien* (2)). The bathroom was a communal bathroom and even if the applicant did place the gold where it was found and no one else knew where it was the applicant was not in possession or control of the gold. Possession means actual control and exclusive access to an article. An informer may have "planted" the gold in the bathroom in which case it could not be said to be in the applicant's possession. In the phrase "having in possession or control" the word "having" is the material word.

[LATHAM C. J. referred to *Pollock and Wright on Possession in the Common Law*, p. 12.]

Stables, for the respondent. The magistrate drew wrong inferences and reasoned from a wrong premise. "Control" is a word with a wider signification than possession (*Hedberg v. Woodhall* (3)). The facts in this case point irresistibly to the inference that the applicant placed the gold where it was found and retained control over it. Williams said that no one else was interested in the gold and the reasonable inference was that he had secreted it. It is unnecessary to prove that the possession was exclusive in the strict sense. Exclusiveness is always a matter of degree: *Pollock and Wright on Possession in the Common Law*, p. 12. The prosecution need show only that the defendant had effective power over

(1) (1919) 26 C.L.R. 265.

(2) (1921) 23 W.A.L.R. 34.

(3) (1913) 15 C.L.R. 531.

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Hartrey, in reply.

Cur. adv. vult.

The following written judgments were delivered:—

Sept. 15.

LATHAM C.J., DIXON and McTIERNAN JJ. This is an application for special leave to appeal from an order of the Full Court of the Supreme Court of Western Australia making absolute an order nisi to review a decision of a stipendiary magistrate given in the Court of Petty Sessions at Perth. The matter before the stipendiary magistrate is a complaint charging the applicant Williams with an offence under s. 36 of the *Gold Buyers Act* 1921-1948 (W.A.). The charge was that the applicant had gold in his possession or control and when required by the complainant, a member of the police force, to satisfy him that the applicant had come lawfully by such gold, failed to do so. The order of the Supreme Court remitted the complaint to the magistrate with a direction that possession or control by the defendant, that is, the applicant, of the gold, the subject of the complaint, had been sufficiently established by the complainant and that the defendant should therefore be called upon pursuant to s. 36 of the *Gold Buyers Act* to prove to the satisfaction of the magistrate that he honestly came by the gold.

The facts proved in evidence were these. The applicant lives at Cue. He arrived in Perth on 1st March 1949 and put up at the Victoria Hotel. He brought with him three small gold bars of bullion weighing about sixty ounces. The complainant, who was a detective sergeant, while in company with a police constable saw the applicant in the street at about half-past nine on the following evening. He told him that he had reason to believe that he was dealing in illicit gold. This the applicant denied. The detective sergeant asked him where he was staying and expressed a desire to look through his rooms, to which the applicant raised no objection. The two policemen made a quick search and left, accompanied by the applicant. They returned twenty minutes later. The constable and the applicant re-entered the room; the detective sergeant went to the hotel bathroom, which was some distance from the bedroom. He searched the bathroom and found underneath the bath near the outlet a brown paper package containing the three pieces of gold. To find it he went down on his knees and looked under the bath with an electric torch. The gold was behind

(1) (1946) A.L.R. (C.N.) 572.

(3) (1923) V.L.R. 556.

(2) (1926) V.L.R. 235.

the outlet and could not be seen from above. He returned to the room and questioned the applicant as to his knowledge of the gold, telling him where he had found it. The applicant denied all knowledge of the gold, but upon the detective sergeant's pointing out the name of the applicant's employers upon the paper and saying that he proposed to get in touch with them the applicant said "It is no use beating about the bush, it is my gold." They went to the police office, where the applicant repeated that it was his gold and that he was going to plead guilty to it. He said that he identified it by the numbering on the tape with which the bars were tied up, and that nobody else was interested in it. The evidence did not explain why the detective sergeant went to the bathroom to search. It seems to have been assumed, both by the magistrate and by the Full Court, that after leaving the hotel on the first occasion he had obtained some further information from some undisclosed source.

The magistrate dismissed the complaint on the ground that at the material time the defendant did not have actual possession of the gold or exclusive possession of the place where it was found, namely, the bathroom. He considered there was no evidence that the defendant placed the gold where it was found or that he alone knew it was there. He said that, on the contrary, it seemed that somebody else must have known the whereabouts of the gold, otherwise the detective sergeant would not have found it.

In reversing this decision the Full Court took the view that the magistrate drew the wrong deductions from the facts before him. Their Honours were of opinion that the only possible inference on the facts was that the applicant was in possession of the parcel of gold hidden under the bath. There was no suggestion that anyone else could have put it there. He claimed it when it was found, and it was sufficiently obvious that he could get it when he wished.

The application for special leave was supported upon the ground that this decision was inconsistent with what was laid down in this Court in *Moors v. Burke* (1) and that the principles explained in that decision were applicable to s. 36 of the *Gold Buyers Act* 1921-1948. It was further submitted that the question which is raised was one of considerable importance in the administration of s. 36 of the Act. *Moors v. Burke* (2) was decided upon what is now s. 40 of the *Police Offences Act* 1928 (Vict.). That section deals with the unexplained possession of personal property suspected to be stolen. As the section was originally framed it spoke of "possession," but

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in *Tatchell v. Lovett* (1), Hood J. had construed the word "possession" as meaning possession in fact, and as not extending to any form of constructive possession. The Victorian Legislature gave effect to this decision by placing the word "actual" before "possession" and it was upon the section in that form that *Moors v. Burke* (2) was decided. Section 36 of the *Gold Buyers Act* is directed to the analogous but by no means identical purpose of throwing upon persons who are proved to be engaged or to have entered into transactions with gold the onus of justifying their legality. Section 36 applies to a person engaged in a number of transactions. It applies if he offers gold for sale or for smelting; if he has gold in his possession or control; if he has sold any gold; if gold has been smelted for him. It further applies if in a prosecution under the section against some other person he states that he gave or entrusted or is alleged to have given or entrusted the gold to the defendant. In any of these circumstances the section provides that he may be required by a licensed gold buyer or a licensed gold assayer to whom the gold is or was offered or by whom it was bought or smelted or by any member of the police force or by a justice to satisfy him that he came lawfully by the gold or that it was obtained from a claim, place or works mentioned in an entry signed by him. If he does not satisfy the person who so calls upon him, then proceedings for an offence against the Act may be taken against him. Upon the hearing of the proceedings, unless the defendant proves to the satisfaction of the magistrate that he honestly came by the gold he is to be convicted of an offence.

It is plain that these provisions are founded upon the principle that a person who is closely connected by some transaction of an objective description with gold and deals with it either by sale or analogous dealing or by having it in his control and possession should have the onus thrown upon him of accounting for his connection with the gold. If the word "possession" were given the extended meaning of which it is capable in the law it would include many cases of constructive possession where the real connection of the accused with the gold was ambiguous and uncertain, and where it would not be fair to throw so great an onus upon him. In the context it therefore appears right to construe the words "possession or control" as referring to *de facto* possession and actual control and not to extend the word "possession" to constructive possession.

The result is much the same as if the word "actual" had been written before the word "possession," but *de facto* possession is a

(1) (1908) V.L.R. 645.

(2) (1919) 26 C.L.R. 265.

conception which is itself much more extensive than that of physical custody. It is wide enough to include any case where the person alleged to be in possession has hidden the thing effectively so that he can take it into his physical custody when he wishes and where others are unlikely to discover it except by accident. The present case therefore depends on a question of fact, namely, whether the applicant had hidden the gold under the bath. It seems clear enough that whoever hid it there chose an effective hiding place and that when concealed there the gold was at his command. The fact that at some periods of the day the bathroom might be in use by other persons, so that for the time being the applicant could not obtain access to it, is unimportant. It is not as if he was entirely excluded from access to it for any lengthy period. Even if the applicant had not himself hidden it, it would be enough if an accomplice had done so with his knowledge, or after hiding it had communicated the hiding place to him for the purpose of enabling him to find the gold. The difference between the view of the magistrate and that of the Full Court is simply upon the proper inference to be drawn, and the magistrate appeared to be of opinion that there were reasonable hypotheses consistent with someone else than the applicant or his accomplice having hidden the gold. Possibly the magistrate may have taken the view that an accomplice may have hidden the gold but failed to acquaint the applicant with the hiding place.

These are not questions on which it would be proper to give special leave to appeal, and that would be a sufficient ground for refusing the application. But in any case the view of the Full Court upon the question of fact seems preferable to that of the magistrate. The magistrate's opinion involved not a reasonable hypothesis, but merely a speculative hypothesis. For these reasons the application should be refused. The Supreme Court awarded to the complainant the costs of the appeal from the magistrate to that court. The correctness of this exercise of the discretion of the Supreme Court was contested but that is not a matter upon which special leave would be granted.

RICH J. The phrase in the section we are called upon to interpret is "possession or control." Possession does not mean actual physical possession or manual detention. "Suppose I request a bystander to hold anything for me, it still remains in my possession. So also possession may be required or retained over goods which are in the manual detention of a third person": *R. v. Sleep* (1), per

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Willes J. And the phrase possession and control denotes the right and power to deal with the article in question. In the instant case the question resolves itself into one of fact. In any given case it is necessary to take into consideration all the circumstances and the nature of the thing the subject of the inquiry. In the circumstances of this case as the accused claimed the gold when it was “discovered” I consider that the inferences which can be drawn are that the accused knew that the gold was concealed under the bath, that it was placed there by himself or an accomplice and to use the words of *Dwyer C.J.* that “he could have got it when he wished.” He had it as effectually under his control or his *de facto* possession as if he had locked it in a box in the bathroom, a box of which he and he alone had the key, or if you like he and an accomplice alone had keys.

The application should be dismissed.

Application for special leave refused.

Solicitor for the applicant: *M. Kott.*
Solicitor for the respondent: *H. T. Stables.*

F. T. P. B.