[HIGH COURT OF AUSTRALIA.]

O'SULLIVAN . . . . . APPLICANT;
COMPLAINANT,

AND

REEDY . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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MELBOURNE. *June* 15.

Williams A.C.J., Webb, Fullagar, Kitto and Taylor JJ.

Police Offences—Being in possession of property "which . . . may at any time prior to the making of such charge have been" reasonably suspected of having been stolen or unlawfully obtained at the time of being in his possession or being conveyed by him—Necessity for actual suspicion—Necessity for allegation in complaint—Police Act 1936-1951 (*No.* 2280 *of* 1936—*No.* 12 *of* 1951) (*S.A.*), *s.* 93 (1).

Section 93 (1) of the *Police Act* 1936-1951 (S.A.) provides: "Any person having in his possession . . . any personal property whatsoever which in the opinion of the special magistrate . . . before whom he is charged may at any time prior to the making of such charge have been reasonably suspected of having been stolen or unlawfully obtained at the time of being in his possession . . . shall, if he does not give an account to the satisfaction of that special magistrate . . . as to how he came by that personal property, be deemed to be guilty of a misdemeanour . . . ".

Held, that it is a necessary ingredient of the offence under s. 93 (1) that a concrete suspicion must have been actually entertained on reasonable grounds by some particular person at some particular time prior to the making of the charge; and, accordingly, a complaint alleging that the defendant had goods in his possession which "might have been" reasonably suspected of having been stolen did not disclose an offence under s. 93 (1).

Moore v. *Allchurch* (1924) S.A.S.R. 111, approved; *Willis* v. *Burnes* (1921) 29 C.L.R. 511, commented on.

Decision of the Supreme Court of South Australia (Full Court) affirmed.

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

By a complaint and summons dated 22nd July, 1952, Thomas O'Sullivan, Inspector of Police, charged Wilfred Charles Reedy, of

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77 Victoria Street, Prospect, South Australia, with having, on 5th March, 1952, at Prospect "had in his possession personal property, to wit, 225 pieces of Baltic red deal which prior to the making of this charge might have been reasonably suspected of having been stolen or unlawfully obtained: Contrary to the provisions of section 93 (1) of the *Police Act* 1936-1951".

On 3rd October, 1952, the complaint came on for hearing before G. H. Walters, Esq., a special magistrate sitting as a court of summary jurisdiction but, before a plea was taken, counsel for the defendant objected to the complaint on two grounds, namely, (a) that it did not allege an actual suspicion but merely the possibility of a suspicion; (b) that it did not allege that the suspicion related to the time at which the property was in the defendant's possession. The first objection was overruled but, the second objection being upheld, the complaint was dismissed.

From this decision the complainant O'Sullivan appealed to the Supreme Court of South Australia. On 20th January, 1953, *Mayo* J., before whom the appeal was heard, allowed the appeal and remitted the complaint for hearing.

In pursuance of leave granted by *Mayo* J., the respondent Reedy appealed against this decision to the Full Court of the Supreme Court of South Australia, which Court, constituted by *Napier* C.J., *Reed* and *Abbott* JJ., on 29th April, 1953, allowed the appeal and restored the order of dismissal made by the court of summary jurisdiction at Prospect on 3rd October, 1952.

The judgment of *Napier* C.J. with which the other members of the court, in separate judgments, agreed, was, so far as is relevant, as follows:—"As a matter of first impression, the language which now appears in s. 93 of the *Police Act* 1936-1951 (S.A.) may be obscure and difficult to follow, but the construction put upon it in *Moore* v. *Allchurch* (1) has been generally accepted, and, so far as I am aware, has never been questioned or doubted, although the statute has been repealed in the meantime and re-enacted in the same terms. According to that construction, 'the fact which the section requires the prosecution to prove is a concrete suspicion actually entertained upon reasonable grounds by some particular person at some particular time. . . . The elements of this offence are therefore (1) the possession of property (2) which is reasonably suspected, and (3) the failure to give a satisfactory account'. (*Almond* v. *Lenthall* (2)).

Conforming to this view of the section, the recognized form of the complaint has been—for more than twenty-five years—a charge

(1) (1924) S.A.S.R. 111.

(2) (1929) S.A.S.R. 267, at p. 272.

that the defendant ' did unlawfully have in his possession property which *was*, prior to the making of the charge, reasonably suspected of *having been* stolen or unlawfully obtained '. In *Holmes* v. *Thorpe* (1) the charge was not quite in that form, but ever since then I think the stock form has been as I have said. (In that connection I refer to *Henderson* v. *Surfield* (2); *Corsten* v. *Noblet* (3); *Almond* v. *Lenthall* (4); *Harrison* v. *Trotter* (5); *Sampson* v. *Crafter* (6); and *O'Sullivan* v. *Tregaskis* (7).)

When this common form is set beside the formula used in the present case it seems to me that there is a very significant divergence. In the common form the defendant is charged with the unlawful possession of property which *was* actually suspected, as, I think, the section requires; but the complaint in the present case charges the defendant with the possession of property which *might* have been suspected, and I am unable to read that as an allegation that the property was, in fact, suspected. It seems to me that, according to the natural use and meaning of the English language, it is an allegation of facts or circumstances that might or could have justified a reasonable suspicion, but it does not allege the fact which the prosecutor had to prove, namely, a concrete suspicion actually entertained by some particular person at some particular time prior to the making of the charge.

It is conceded that, if the question had to be determined upon the practice of the common law, the complaint would be defective, as disclosing no offence against the provisions of the Statute. The rule is that ' every pleading, civil or criminal, must contain an allegation of the existence of all the facts necessary to support the charge or defence set up by such pleading. An indictment (and the same applies to a complaint under this Act) must therefore contain an allegation of every fact necessary to constitute the criminal charge preferred by it '. (*Reg* v. *Aspinall* (8)). In my opinion it is manifest that the fact, which this complaint alleges, is not that the property was suspected. The allegation is that it might or could have been reasonably suspected, whether it was or was not actually suspected. That is not the condition precedent to the offence constituted by s. 93, as appears by *Corsten* v. *Noblet* (3), where the complaint was in the proper form, and the evidence showed that the property might or could have been reasonably suspected, but failed to disclose that it had actually been

(1) (1925) S.A.S.R. 286.
(2) (1927) S.A.S.R. 31; 192.
(3) (1927) S.A.S.R. 421.
(4) (1929) S.A.S.R. 267.
(5) (1937) S.A.S.R. 7.
(6) (1940) S.A.S.R. 427.
(7) (1948) S.A.S.R. 12.
(8) (1876) 2 Q.B.D. 48.

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suspected. In those circumstances *Piper* J. allowed the appeal, and quashed the conviction. It follows that proof of the fact alleged in this complaint would not support a conviction under s. 93.

I am clearly of the opinion that the allegation in the complaint before us fails to allege the fact which the special Act prescribes as one of the conditions precedent to the defendant being called upon to account for his possession of the property. It seems to me that, according to the convention of our statute law, the Police Act is deemed to be 'speaking at all times', and, following this convention, it uses the subjunctive mood—'may have been'—to express the condition of hypothesis which brings the section into operation; but, in order to charge the offence, it is necessary to allege that the prescribed condition or hypothesis has been fulfilled or established. For that purpose the language of the Act has to be transposed into the mood and tense which express a categorical statement of the fact. In this case the necessary transposition was into the indicative mood and the past tense. It seems to me that the draftsman of this complaint has 'taken the wrong turning' and, in the result, he has alleged something which is not a charge of the offence".

The respondent O'Sullivan applied ex parte for special leave to appeal from this decision to the High Court of Australia.

R. R. St. C. Chamberlain Q.C., and *W. A. N. Wells* for the applicant. There was no appearance for the respondent.

The following judgments were delivered:

WILLIAMS A.C.J. This is an application for special leave to appeal from an order of the Full Supreme Court of South Australia made on 29th April, 1953, whereby it was ordered that the appeal be allowed, the order of Mr. Justice *Mayo* be set aside and the order of dismissal made by the court of summary jurisdiction at Prospect be restored.

The origin of the proceedings was a complaint laid on 22nd July, 1952, that Wilfred Charles Reedy had in his possession personal property to wit 225 pieces of Baltic red deal which prior to the making of this charge might have been reasonably suspected of having been stolen or unlawfully obtained contrary to the provisions of s. 93 (1) of the *Police Act* 1936-1951. Before a plea was taken from the defendant his counsel, Mr. *Pickering*, took objection to the sufficiency of the complaint and the magistrate upheld the

contention though not on the precise ground that succeeded in the Full Court. There was an appeal to the Supreme Court which was heard in the first instance by *Mayo* J. who allowed the appeal and remitted the matter to the court of summary jurisdiction for hearing. From the order of *Mayo* J. there was an appeal to the Full Court which made the order to which I have already referred.

The application to us for special leave raises the true interpretation of s. 93 (1) of the *Police Act* 1936-1951 (S.A.) and, in particular, the words in that sub-section " may at any time prior to the making of such charge have been reasonably suspected of having been stolen or unlawfully obtained at the time of being in his possession or being conveyed by him ". The question is whether the words " might have been " which appear in the complaint are sufficient to support the principal ingredient of the offence or whether this ingredient is only properly alleged if the word " was " is substituted for those words, so that it is necessary to prove that prior to the making of the charge some person had formed a reasonable suspicion that the goods had been stolen &c.

The Full Court held that the sub-section requires the prosecution to prove an actual suspicion or, as they called it, a " concrete suspicion " actually entertained on reasonable grounds by some particular person at some particular time prior to the making of the charge. This has been the interpretation placed on the sub-section in South Australia ever since the case of *Moore* v. *Allchurch* (1). The submission of the applicant is that it is not necessary to prove such an actual suspicion. It is sufficient if facts are proved from which the magistrate could reasonably infer that a hypothetical reasonable person in possession of those facts could reasonably have suspected that the goods had been stolen &c. In my opinion, the interpretation placed on the sub-section by the Full Court was right, and I can see no reason for dissenting from anything that was said by the learned Chief Justice in his judgment.

It was contended that the views which he expressed are inconsistent with those expressed by this Court in *Willis* v. *Burnes* (2). This Court was there concerned with the onus of proof under the corresponding section in a New South Wales Act. Evidence had been given of an actual suspicion entertained on reasonable grounds by a constable before the charge was made, and the particular point now raised before us was not before the Court for decision. The reasoning in that case should be regarded as confined to what was actually decided, and it should not be regarded as an authority

(1) (1924) S.A.S.R. 111.

(2) (1921) 29 C.L.R. 511.

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that is in any way in conflict with the interpretation placed upon the sub-section by the Full Court of South Australia.

It was also sought to support the application for special leave to appeal by a submission that the Full Court should have applied ss. 22a, 55 and 181 of the *Justices Act* 1921-1943 (S.A.). The Full Court considered that these sections were not applicable broadly on the ground that, wide as they were, they did not authorise a person to be charged upon a complaint that did not contain the proper ingredients of the offence but raised a false and irrelevant issue and, instead of alleging the suspicion which is the gist of the charge, alleged something else. They accordingly refused to apply these sections. We need not, I think, consider whether they were right or wrong in their refusal, because they were dealing with a particular complaint and their remarks with respect to this complaint do not constitute a sufficient ground for this Court to interfere by granting special leave to appeal.

In my opinion special leave to appeal should be refused.

WEBB J. I agree.

FULLAGAR J. I agree. It seems to me that the applicant's contention has for its essential feature the view that the words " may have been " in the section mean " could have been ". That appears to me to be a view which it is not possible to entertain, having regard to the reference to time in the section. The true view appears to be, and I would say clearly to be, that which is expressed by the learned Chief Justice of South Australia on p. 36 of the transcript, where he says that the section " uses the subjunctive mood—' may have been '—to express the condition or hypothesis which brings the section into operation; but, in order to charge the offence, it is necessary to allege that the prescribed condition or hypothesis has been fulfilled or established. For that purpose the language of the Act has to be transposed into the mood and tense which express a categorical statement of the fact ". That interpretation gives a quite different meaning to the section from that for which the applicant contended. It is a simple matter of English grammar. So far as *Willis* v. *Burnes* (1) is concerned, I agree with what has been said by the learned Acting Chief Justice of this Court. I would only add that the suggestions conveyed by certain words which appear in brackets in what was said by Sir *Adrian Knox* are in the nature of the merest obiter dicta. I agree that special leave to appeal should be refused.

(1) (1921) 29 C.L.R. 511.

KITTO J. I agree with both the judgments that have been delivered. I have nothing to add.

TAYLOR J. I agree with what has already been said and that special leave to appeal should be refused.

Solicitor for the applicant: *R. R. St. C. Chamberlain*, Crown Solicitor for the State of South Australia.

R. D. B.