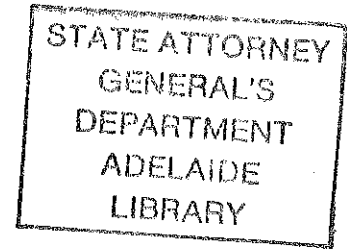


State Attorney General's Department 9205

DELIVERED 16th JUNE 1986



SWIFT v. BAEHNK

No. 1496 of 1986

Dates of Hearing: 16th June, 1986.

JUSTICES APPEAL

J U D G M E N T of the Honourable Mr. Justice Legoe
(extempore)

(Justices Appeal - Receiving - knowledge property stolen - inferences - proof beyond reasonable doubt - "I find that the defendant's story is inconsistent with innocence" - reversal of onus - errors of fact based upon questions of prosecutor and not appellant's answers - appeal allowed.)

Counsel for Appellant: Mr. Elmslie
Solicitors for Appellant: Andersons.
Counsel for Respondent: Mr. Wainwright
Solicitor for Respondent: Ms. C. Branson,
Crown Solicitor.

Judgment No. 9205

SWIFT v. BAEHNK

Legoe J. (extempore)

LEGOE J.: This is an appeal against conviction for an offence under section 196 of the Criminal Law Consolidation Act. The appellant was charged with receiving two car guards and one grille, the value of \$265, the property of Atlas Motor Wreckers, "knowing it to have been stolen".

The prosecution called three witnesses, namely the owner of the property - or rather the manager of the owner, Atlas Motor Wreckers, one Kim Penley, and two police officers, namely Constable Hall and Constable Vincent; the latter having questioned the appellant about the alleged offence.

In his extempore reasons for convicting the appellant, the learned special magistrate pointed out that much of the material in evidence was not in dispute, in particular that the goods referred to in the information had been stolen from the premises of Atlas Motor Wreckers, and secondly, "that some days later the defendant was found in possession of Fairlane guards and a grille". There was, in the case, undisputed evidence of recent possession. Further, the learned special magistrate was satisfied from the evidence - and there was abundant material to support this - that those particular goods had been stolen from the premises of the owner some days earlier. The learned special magistrate accepted the evidence of the three prosecution witnesses.

However, the only evidence as to whether the appellant knew that the property had been stolen was from the appellant himself. The appellant gave evidence and was extensively cross-examined upon the circumstances surrounding

the alleged offence, and in particular his acknowledged possession of the goods and the circumstances in which he was contacted, leading to his purchase of the goods for the prices mentioned in evidence, namely \$65 for the lot: (see page 10 of the appellant's evidence-in-chief).

The learned special magistrate acknowledged that the question of the appellant's knowledge was the central issue in dispute. Further, he stated quite correctly that it was for the prosecution to prove that guilty knowledge and to prove it beyond reasonable doubt. He further observed that if the prosecution have to prove such knowledge in this particular case, then it could only be by way of inference from the circumstances. This was because the appellant had throughout made no admission of any knowledge of the items having been stolen and, indeed, as the learned special magistrate further quite correctly observed, had denied any such knowledge.

In coming to his conclusion to arrive at a finding of fact, the learned special magistrate observed seven different aspects or circumstances of the particular transaction, namely -

1. The transaction occurred at night.
2. The transaction was initiated by an unsolicited telephone call received by the appellant "from a person who did not identify himself".
3. That person subsequently arrived at the appellant's premises with some car parts "rather than inviting the defendant to inspect those articles at his own premises where one presumes they had been".
4. The appellant made no inquiry as to the name of the

supplier nor as to where the goods had come from.

5. The person bringing the goods was not known to the appellant, nor had the appellant seen this person subsequently.
6. The appellant said that the guards on his car were in a better condition than those which he had purchased although the blue one was from a different model. "The question must be asked, why replace them especially with articles the condition of which the appellant was critical?"
7. There seemed absolutely no reason whatsoever to buy two guards.

The learned special magistrate said that he mentioned these seven matters collectively and added that individually each could be explained. He then said, in his extempore reasons, "But altogether I find there are too many coincidences and I find that the defendant's story is inconsistent with innocence." Accordingly, the learned special magistrate disbelieved the appellant as to his state of knowledge and found that he had purchased the goods knowing them to have been stolen and therefore the charge was proved.

Before dealing with the grounds of appeal themselves, I observe, as I pointed out to counsel during the course of their submissions, the learned special magistrate appears to have reversed the onus of proof. Counsel for the respondent conceded that this part of his Honour's reasons was apparently inadequately expressed and when read literally may be construed that way. However, counsel submitted that this was not clear and the matter should be remitted to the learned

special magistrate to in some way clarify this part of his reasons. I indicated to counsel that I did not consider that to be the correct way of disposing of the appeal. In my judgment, I must determine whether the appellant has made out his grounds of appeal and, if so, what are the consequences of that conclusion on appeal.

The first ground of appeal claims that certain of the primary findings of fact were not available on the evidence before the learned special magistrate and that those errors were substantially relied upon by the learned special magistrate to support a finding of guilt. Very briefly, the three matters relied upon are the sixth, seventh and third points set out above. Counsel drew my attention to various passages in the evidence in relation to these three matters, where counsel for the appellant claimed the magistrate had fallen into error. It appears to me from a perusal of this evidence that basically in each case the learned special magistrate has taken the question of the prosecutor to form the basis of his finding of fact in relation to all of these three matters, for example, if one was to take the seventh point referred to by the learned special magistrate, namely that "there seemed absolutely no reason whatsoever to buy two guards." One must compare this finding with a question and answer on p.14 in the appellant's cross-examination where the prosecutor asked "Why buy two of them if you only had one guard that needed replacing?" The appellant's answer to this question, which was not referred to in any way by the learned special magistrate in making this seventh point upon which he relied, was as follows:

"I knocked him down, I got a good deal, he wanted to sell both of them."

That was an explanation. The learned special magistrate did not say whether he accepted that explanation or rejected it or whether he believed it or disbelieved it. The appellant's answer was the evidence which mattered and was the evidence which the tribunal of fact was called upon to assess and make findings upon.

A tribunal of fact cannot, and indeed must not construct findings of fact out of the innuendo or imputations or indeed the substance of the cross-examiner's questions, or for that matter any other questions simpliciter in the course of evidence. The same comments could be made with equal force as I see it in relation to the other two matters that were alleged to be errors in the learned special magistrate's findings, and reliance upon the seven points. I further mention point number 3, where the learned special magistrate appears to have relied upon the fact that the person selling these stolen goods came around to the appellant's premises "rather than inviting the defendant to inspect those articles at his own premises where one presumes they had been." This last finding comes directly from the prosecutor's question, and is quite unrelated to the appellant's answer appearing on p.12.5, which was in fact a direct denial of the prosecutor's question, when the appellant said:

"Not really, I offered to pick them up and he said 'No, I will bring them down.'"

Once again it is a direct contradiction to the innuendo in the question, and the appellant's explanation has not been considered or apparently taken into account or assessed in any

way by the learned special magistrate.

The second ground of appeal complains that the learned special magistrate in drawing inferences from those primary findings of fact, drew inferences that were incapable of either collectively or individually supporting the conclusion that the defendant's state of mind or state of knowledge was such that it had been proved beyond reasonable doubt that he knew the goods were stolen. This ground of appeal overlaps considerably with the first ground and was put on the basis that the substratum of the findings had been substantially destroyed by the evidence referred to in relation to the first ground, and in any event were not capable of establishing a case beyond reasonable doubt even when taken collectively as the learned special magistrate appears to have done. I am of the opinion that ground 2 combined with ground 1 raises the question as to whether the learned special magistrate correctly directed himself on the law as to the onus of proof. I am fully satisfied that the learned special magistrate made an error of law when he made the finding that "the defendant's story is inconsistent with innocence". I need merely refer to the time-honoured authority of Peacock v. The King (1911) 13 CLR 619 which has been accepted and applied in our courts for many many years and is in this regard an authority to establish that such a direction to be made to a tribunal of fact is a misdirection, and therefore the appeal should be allowed on that point, as well as the grounds of appeal which were expressly argued.

For these reasons I would uphold the appeal and find that the conclusions reached by the learned special magistrate

were arrived at by reason of a misdirection, and by reason of errors in the findings which were made, which errors are clear and apparent from the face of the record and are such that this court can interfere along the lines suggested in Warren v. Coombes 142 CLR 531.

Counsel for the respondent submitted that the matter should, in any event, be remitted to the court of summary jurisdiction. In my opinion, once the appellant has established his grounds of appeal, and that the conviction was arrived at by reason of an error either by reason of misdirection or for some other reason, then the appeal should be allowed and the conviction set aside. The question then arises as to whether a new trial should be ordered before another special magistrate. In this regard, I refer to Dayey v. Liebelt (1960) S.A.S.R.1 at 4, where Reed J. said that in that case there had been a denial of a fair trial because the appellant was not informed at the trial of his right to call witnesses and evidence which should not have been admitted had in fact been given and weight had been given to evidence admitted at the trial. His Honour went on:

"It is therefore not possible to express an opinion as to the likelihood of a conviction if the hearing had proceeded according to law. Furthermore, it is also very difficult to come to a satisfactory conclusion as to the prospects of a conviction if there should be a rehearing. In these circumstances it appears to me that it would not be just to place the appellant again in jeopardy. The evidence to which the justices should have confined their attention was far from strong, and no doubt it may be fairly argued was insufficient to support the conviction. I see no reason why the prosecution should have what may be called a 'second shot' by obtaining the opportunity to supplement the evidence already given. In that connection, attention may be drawn to what O'Connor J. said in Peacock v. The King, (1911) 13 C.L.R. 619 at 675."

In this case, the prosecution are in effect asking for a second opportunity to give yet another court another opportunity to assess the appellant's evidence and the satisfaction of his explanation. Unless another court could say that the appellant's explanation was blatantly untruthful, and therefore the court could find beyond reasonable doubt that the explanation should be rejected, and the appellant's evidence relating to the reason why he bought these goods from this unidentified person in the circumstances in which he purchased them established his guilty knowledge beyond all reasonable doubt, I do not see how the prosecution could establish a conviction in this case. Like Reed J., I would say that the evidence in this case was not strong unless and until I could say that I was reasonably confident that another court would make such a finding against the appellant. As was said in Davey's case, *supra*, it is very difficult to come to a satisfactory conclusion as to the prospects of a conviction if there should be a rehearing. I applied the case of Davey v. Liebelt in the matter of McMinn v. Daire, a judgment delivered on 4 February 1982. For these reasons I reject the application for a rehearing before the same special magistrate or any other magistrate. The order of the court is that the appeal will be allowed, the conviction and sentence quashed and an order of dismissal will be substituted therefor.

There will be an order that the respondent pay the appellant his costs of and incidental to the appeal which I fix at \$120.