Goods in Custody

A Discussion Paper

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Reasonable Cause CPD Conference

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The paper endeavours to state the law of New South Wales as at 10 March 2013.

Section 527C of the *Crimes Act 1900 (NSW)* sets out a series of four separate offences which have collectively become known to participants in the criminal justice system as "Goods in Custody". These four separate offences occupy the lowest echelon in the criminal calendar for matters of dishonesty. They are often the easiest to prove, and are generally charged by police informants and prosecutors when all else fails (i.e. when there is not enough evidence for the prosecution to "get over the line") in relation to more serious charges.

It is important for defence practitioners to remain vigilant in the face of these draconian charges, and not simply enter pleas at the perceived end of the line for plea bargaining, or as a matter of expediency due to the relatively less serious nature of the offence charged.

Though these offences are the least serious end of the range for dishonesty offences, they are very often the most misunderstood by practitioners, prosecutors, and magistrates alike. Errors in the entering of pleas and incorrect interpretations of the law abound when the courts of summary jurisdiction deal with such matters. This paper seeks to redress that situation for the benefit of the defence.

Four Separate Offences

Note that *Lexisnexis Criminal Practice and Procedure* "Proof Material" is clearly wrong in depicting the section as disclosing one offence only.

The reason why the section clearly discloses four separate and distinct offences is quite simple – each subsection (1)(a), (1)(b), (1)(c) and (1)(d) has different elements. An offence that simply charges, "…defendant did have goods in custody…" would not be an offence known to law as it does not clearly come within any of the subsections as it lacks an essential element (i.e. the type of custody) before being capable of coming within one of the four offences.

Different elements mean different offences, and cannot be dealt with as mere particulars which are to be treated as variances [pursuant to *Criminal Procedure Act* s 179] whenever the prosecution discovers mid hearing that they have charged the wrong offence, or no offence at all. See further the *Lexisnexis* commentary on this section of *the Criminal Procedure Act* in this regard.

So what are these four separate offences? They are outlined in each of the sub-paragraphs of s 527C(1) and are in essence as follows:

(1) (a) goods in personal custody
(b) goods in custody of another
(c) goods in custody in or on premises
(d) goods with custody given to another who is not lawfully entitled to possession.

Definition of Custody - Custody is NOT the same as Possession.

The *Crimes Act* does not provide a definition of "custody" for the purposes of section 527C. The task has been left to the common law. *Ex parte McPherson* (1933) 50 WN 25 is authority for the proposition that custody is "*the immediate de facto control or charge of the article in question."*

Note that this would appear to be conceptually narrower than the concept of possession. Note the *Crimes Act* definition of possession in Crimes Act s 7 which reads as follows:

Where by this or any other Act the unlawful receiving of any property, or its possession without lawful cause or excuse, is expressed to be an offence, every person shall be deemed to have such property in his or her possession within the meaning of the Act who:

a) *has any such property in or his or her custody; or*

b) *knowingly has such property in the custody of another person; or*

c) *knowingly has any such property in a house, building, lodging, apartment, field, or other place, whether belonging to or occupied by himself or herself or not, and whether such property is there had or placed for his or her own use, or the use of another.*

Note: this definition has been held not to apply to matters under the Drug Misuse and Trafficking Act (see *Dib* (1991) 52 A Crim R 64).

At first glance the definition here appears on the face of it to be very similar to that which is enumerated in the various subsections of s 527C. There are however important differences. Firstly, the definition of "possession" is all encompassing of a number of concepts within the one definition, and any one of these concepts can be applied within the one offence charged. This is in sharp contrast to s 527C where different parts of this definition appear to be replicated in some (but not all) of the subsection of s 527C.

As s 527C creates four separate and distinct offences each with different elements, the particular type of custody alleged in the subsection charged must be proven beyond reasonable doubt. The availability of interchangeable parts of one broad definition (as per the definition of possession) is therefore not available in Goods in Custody matters.

Further to the above, concepts of "custody" and "possession" are inherently different in any case. They both may co-exist on a given set of facts but that is NOT because they are conceptual equivalents.

Note the concept of immediacy contained within the common law definition of custody in *Ex parte McPherson* (1933) 50 WN 25 above. Compare this to notions of possession both in statute and common law and it is apparent that immediacy is not an imperative in order to satisfy the definition of possession. In this regard see *Williams v Douglas* (1949) 78 CLR 521, where the fact that an accused could not immediately access something did not mean that the accused did not "possess" it.

Personal Custody – Must Coincide And Co-exist With Time of Arrest

This point often provides an excellent defence to a charge of goods in personal custody under s 527C(1)(a). It is an available defence that is frequently overlooked by defence practitioners. This is where knowledge of the definitions and case law becomes very important.

The leading modern authority on this issue is *R v English* (1989) 44 A Crim R 273 where Gleeson CJ affirmed the earlier decision of *Cleary v Wilcocks* (1946) 63 WN (NSW) 101.

The facts in *Cleary v Wilcocks* provide a worthy example of the point. The accused was said to have possessed some watches reasonably suspected of being stolen. Such possession was said to have occurred on 14 May 1945. The accused was first spoken to by police on 17 May 1945. Police alleged that the accused had sold the watches in the intervening three days. The accused was not charged by police until some months after they had first spoken to him. The magistrate dismissed the information as the accused was not in possession of the watches "upon being charged". The decision of the magistrate was upheld on appeal.

The rationale for such a decision is plain in that if this were not the case, then there would be no purpose to the later subsections (1)(b), (1)(c) and (1)(d).

Personal Custody – The Exception for Further Police Investigations

English (1989) 44 A Crim R 273 is also authority for the proposition that police confiscating items in order that further investigations be conducted does not negate the custody of an accused for the purposes of the section. *English* affirms the earlier decision of *Ex parte Miller; Re Hamilton* (1934) 51 WN (NSW) 23.

The facts in *Ex parte Miller; Re Hamilton* again provide something of a "textbook" example of the application of the principle. In that matter, the accused was questioned by police in relation to bags of wool loaded on a truck being driven by the accused. Police entertained certain suspicions and took away the bags of wool for further investigations and stored them at the police station. Street J found that the temporary detention of the goods by police for the purposes of further investigation did not negate the custody of the accused.

Arrest for Other matters – Does Custody Continue?

If a person is arrested for other matters this may affect their custody (provided it is not personal custody in the sense of being on their immediate person) of any other items subsequently discovered by police. This is so because, having been arrested for other matters, they may no longer have immediate de facto control or charge of the item. It is important to consider this issue when examining a police facts sheet or brief, as it is quite often the case that police find items made the subject of such charges after the person has been arrested. A recurring example is during the execution of a search warrant when the accused has long since been placed under arrest for a more significant charge. This perfectly sound technical defence is often not pursued when it should be.

Two interesting cases arise in this area; those being *Kitchen v Cox* (1996) 85 A Crim R 328 and *R v Abbrederis* [1981] 1 NSWLR 530, both of which provide strong support for any such argument.

In *Kitchen v Cox* (1996) 85 A Crim R 328, Mr Cox was accused of stealing a bottle of scotch from a drive through bottle shop. The proprietor gave police a description of the offender and the motor vehicle including the number plate. Police saw the vehicle, stopped it and placed Cox and another under arrest for the larceny of the scotch. Cox was handcuffed and placed in the back of the police vehicle. Police then conducted a search of the motor vehicle; finding a bottle of scotch as well as workshop equipment such as a welder, cutting and drilling equipment etc. The items appeared to police to be brand new and were found amongst numerous other items. Cox was charged with the Victorian equivalent of goods in personal custody of the tools. The magistrate dismissed the charge at prima facie on the basis that Cox had been deprived of "actual possession" (actual possession being the relevant concept under the Victorian legislation) by virtue of the arrest. The Supreme Court of Victoria (Hedigan J) upheld the decision of the magistrate on appeal.

In *R v Abbrederis* [1981] 1 NSWLR 530 the accused was arrested for importation of heroin. He was remanded in custody and bail was refused. When remanded, his "other" luggage went to the gaol with him. Contained within some of this other luggage (not seized in his initial arrest) was some further heroin. His luggage was stored at the gaol in a separate area from the accused himself. The only way in which he could gain access to the luggage was through and with the permission of the Superintendent of the gaol. On appeal the Crown conceded that the accused was not in "possession" of the heroin. Street CJ (at 533) described this concession at "well founded".

Things In or On Premises

It is important to note that the offence outlined in subsection (1)(c) has as its distinctive element knowledge of the presence of the thing on the premises and the exercise of custody over it.

In *Sturdy v Katarzynski* NSWSC 17 March 1997 unrep Sperling J stated at 1:

"The elements of the offence include knowledge that the thing is on the premises and the exercise of the requisite degree of control over the thing."

So what is "the requisite degree of control"? In *The Appeals of J.A.L and L.L.* (1974) 3 DCR 182 at 190 Muir DCJ (in respect of an earlier form of the section not relevantly different for present purposes) stated:

"…the word 'has' requires the Crown to show as part of its case that the person charged had knowledge that the thing was in or on premises as described in the subsection. Further, I think the section requires that it must be shown that the person had at least some degree of control in respect of the presence of the thing in or on the premises. I do not consider that it is necessary to the point of proving that the person had 'possession' of the thing."

In light of the above, it is important to note that cases such as *Filippetti* (1984) 13 A Crim R 335 and *Dib* (1991) 52 A Crim R 64 concerning possession of drugs on premises may be of assistance, given the right facts. In *Filippetti,* police found prohibited drugs under the cushion of a chair in the lounge room of a premises. There was evidence that there were a number of people living at the premises each of whom had free access to the lounge room area. It was held that there was insufficient evidence to show the accused's exclusive physical control. *Dib* is an example of the application of the *Filippetti* principle.

What is "Reasonable Suspicion" Anyway?

Reasonable suspicion is a concept familiar to the law of arrest and search. Much of the authority as to what constitutes "reasonable suspicion" for the purposes of substantive offences such as goods in custody arises from these other areas.

The current leading decision on what constitutes a "reasonable suspicion" comes from the NSW CCA decision in *R v Rondo* (2001) 126 A Crim R 562. This case concerned an issue of the search of a motor vehicle purportedly pursuant to Crimes Act s 357E. Smart AJ reviewed the authorities on the issue of reasonable suspicion and stated at para [53]:

"[53] These propositions emerge:

(a) A reasonable suspicion involves less than a reasonable belief but more than a possibility.. There must be something which would create in the mind of a reasonable person an apprehension or fear of one of the state of affairs covered by s 357E. A reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence.

(b) Reasonable suspicion is not arbitrary. Some factual basis for the suspicion must be shown. A suspicion may be based on hearsay material or materials which may be inadmissible in evidence. The materials must have some probative value.

(c) What is important is the information in the mind of the police officer stopping the person or the vehicle or making the arrest at the time he did so. Having ascertained that information the question is whether that information afforded reasonable grounds for the suspicion which the police officer formed. In answering that question regard must be had to the source of the information and its content, seen in the light of the whole of the surrounding circumstances."

Other leading cases that pre-date *Rondo* and are worthy of consideration in terms of developing a full understanding of what constitutes a reasonable suspicion include the NSW CCA in *Streat v Bauer & Blanco* 16 March 1998 Supreme Ct Common Law Division Smart J unrep (BC9802155), the High Court of Australia in *George v Rockett* (1990) 170 CLR 104 at 115-116 and *Queensland Bacon v Rees* (1966) 115 CLR 266.

In *Queensland Bacon v Rees* (1966) 115 CLR 266 the High Court of Australia considered the words "had reason to suspect" in the context of bankruptcy legislation. Kitto J at 303 stated:

"In the first place, the precise force of the word 'suspect' needs to be noticed. A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to a "slight opinion, but without sufficient evidence" as Chambers' Dictionary expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of existence."

In *Streat v Bauer & Blanco* BC 9802155 Smart J approved of the above remarks of Kitto J in *Queensland Bacon* and concluded at 7 [in the context of a motor vehicle search case concerning Crimes Act s 357E] as follows:

"Applying what Kitto J said, there must be something which would create in the mind of a reasonable person an apprehension or fear of one of the states of affairs covered by s 357E. ***A reasonable suspicion involves less than a reasonable belief but more than a possibility."***

Smart J in *Streat v Bauer & Blanco* also cited with approval (at 10) the judgment of Lord Hope in *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] 2 WLR 1. This case concerned arrest powers under the Prevention of Terrorism (Temporary Provisions) Act 1984. This Act gave powers of arrest upon "reasonable suspicion" of involvement in certain acts of terrorism covered by the Act. Lord Hope said of "reasonable suspicion" at 11:

"In part it is a subjective test, because he must have formed a genuine suspicion in his own mind that the person has been concerned in acts of terrorism. In part it is also an objective one, because there must also be reasonable grounds for the suspicion which he has formed."

In *George v Rockett* (1990) 170 CLR 104 the High Court of Australia considered the search warrant provisions of the Queensland Criminal Code. The joint judgment considered the notion of reasonable suspicion, and stated (at 115):

"Suspicion, as Lord Devlin said in Hussein v Chong Fook Kam *[1970] A.C. 942 at 948, "in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.'" The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown."*

Reasonable Suspicion: Maximum Threshold or Minimum Standard?

It is consistent across Australian jurisdictions that a reasonable suspicion that goods were stolen may include a reasonable belief: *Ruddock v Taylor* [2005] HCA 48 [71]-[88]. Though 'suspicion' and 'belief' are different mental states, the purposive interpretation of 'suspicion' to include 'belief' serves to ensure "that a man should [not] be entitled to avoid answering, and go free of a charge, if there was some stronger feeling of mind than suspicion:" *R v Grace* (1930) 30 SR (NSW), 158.

It is less consistent whether 'knowledge' that the relevant goods were stolen can satisfy the meaning of 'suspicion' within goods in custody offences. Authorities in New South Wales, Queensland and West Australia affirm that knowledge that goods were stolen may be included within the statutory scope of 'suspicion,' despite this knowledge providing the basis for more serious offences: *R v Grace* (1930) 30 SR (NSW); *Wicks v Marsh* [1993] 2 Qd R 583; Welch v Dao [2019] WASC 115. The rationale behind this approach, or rather, the response to 'injustice' critiques of it, was aptly stated by the Queensland Court of Appeal in *Wicks v Marsh* [1993] 2 Qd R 583 at 587, cited with approval in *Welch v Dao* [2019] WASC 115 [80]:

"We have some difficulty in understanding how it works an injustice to charge an accused person with a lesser offence (attracting a lesser penalty) which can be proven in a summary way, simply because a more serious charge could also be made out for which the accused would be tried by a judge and jury."

In contrast, the South Australian Supreme Court has excluded 'actual knowledge' from the ambit of 'reasonable suspicion' for the purpose of goods in custody charges: *Roderick v Police* (2004) 88 SASR 47. As Besanko J stated in Roderick v Police (2004) at [28]:

"Knowledge has been narrowly defined to mean first-hand knowledge and does not include a state of mind based on information or belief. Belief is suspicion not knowledge."

This principle is consistent with the historical Victorian position in *Fisher v McGee* [1947] VLR 324, which followed *Lenthall v Newman & Newman* [1932*]* SASR 126, the latter of which was affirmed in *Roderick v Police (2004).*

Hearsay – Is It Admissible in Assessing a Reasonable Suspicion?

As discussed previously, much of the law on the concept of "reasonable suspicion" comes from the arrest and search aspects of criminal law. There is authority from these areas of law to the effect that when assessing reasonable suspicion, hearsay evidence is admissible. Cantor J in *R v Lavelle* NSWCCA 24 November 1977 unrep. and the South Australian decision in *Tucs v Manley* (1985) 19 A Crim R 310 are decisions pertaining to this point.

Both of the above cases pre-date the introduction the *Evidence Act 1995 (NSW)* which significantly altered the law of hearsay from its former common law position. Has this principle with respect to arrest and search survived the enactment of the Evidence Act 1995 (NSW)? It would appear so given what was said in *R v Rondo* (2001) 126 A Crim R 562 by Smart AJ at [53] to the effect that "…A suspicion may be based on hearsay material that is not admissible in evidence."

It is interesting to note that the authorities regarding reasonable suspicion for the purposes of search are directed at establishing the issue of unlawful search (and seeking to have evidence obtained in consequence held to be inadmissible with no inclusionary discretion exercised pursuant to Evidence Act s 138). Such issues are therefore generally dealt with on the voir dire in the absence of the jury; or in the Local Court context on the voir dire by the magistrate sitting as the tribunal of law only and not as the tribunal of fact. In a case of goods in custody, however, if hearsay evidence is admissible, it is admissible before the magistrate as the tribunal of fact. The policy essence of the rule against hearsay (both in common law and in statute) is that hearsay evidence is evidence of a kind which may be unreliable (as enumerated in *Evidence Act s.165*). It seems strange therefore that in a post *Evidence Act* Goods in Custody hearing, evidence of a kind which may be unreliable would be admissible as to a key element of a substantive offence when no specific exception to the general rule against hearsay (such general rule now being expressed in Evidence Act s 59). What is particularly disturbing is that the admissibility of such evidence does not come within any of the specific exceptions enumerated in the Evidence Act in the sections immediately following s 59. Do the *Evidence Act* provisions concerning hearsay "cover the field", or does the residual common law as outlined in *R v Lavelle* and *Tucs v Manley* survive by virtue of *Evidence Act* s 9?

There is one post-*Evidence Act* decision of which the author is aware that suggests that the law pertaining to hearsay evidence to prove an offence of goods in custody may have changed in the post-*Evidence Act* world. Note the ***obiter*** remarks of Rothman J in *Lewis v Spen*cer [2007] NSWSC 1383. In that case Mr Lewis was charged with goods in custody of some sunglasses. When questioned by police he claimed to have purchased them from a particular service station that same day. The police officer conducting the investigation spoke to an employee of the relevant service station and ascertained that the service station had records indicating that no sunglasses had been sold on the relevant day. The police officer gave evidence of the results of that aspect of his investigation in evidence before the Local Court. His Honour Rothman J stated:

[21] However, the offence under s 527C of the Crimes Act is an offence relating to a person having in his or her custody goods that "may be reasonably suspected of being stolen". The reasonable suspicion is a reasonable suspicion of the magistrate at the time of hearing: Ex Parte Patmoy; Re Jack [1944] 44 SR (NSW) 351. The only basis upon which the hearsay representation by the shop staff member to the police officer could be relevant would be if it were the reasonable suspicion

of the police officer at the time of arrest that was the relevant test. One of the means by which one could reasonably suspect that the sunglasses were stolen or otherwise unlawfully obtained would be that the place from which the accused alleges it was purchased had not sold any sunglasses (or those sunglasses) on the day in question. However the evidence of the police officer does not prove that fact: see Manley v Tucs (1985) 40 SASR 1 at 12-13; Shaaban Bin Hussein v Chong Fook Cam [1970] AC 942 at 949; Williams v Keelty [2001] FCA 1301; (2001) 111 FCR 175 at [176], [177];Morris v Russell (1990) 100 FLR 386 (ACT Supreme Court).

[22] ....

[23] In this case, the learned magistrate may have suspected, reasonably, that the goods were stolen or unlawfully obtained, if the magistrate were able to consider evidence that the goods were not purchased from the store nominated. But the police officer's evidence was not evidence of that fact. It was "evidence" of a representation by a staff member of the contents of records, i.e., evidence (the police officer's) of a representation (the staff member's) of a representation (the contents of the record). The staff member's representation may be sufficient to give rise in the mind of the learned magistrate of the non-purchase from the store. While that may not prove that the goods were stolen, it may be sufficient to found, when added to other material, a reasonable suspicion. But the material before the learned magistrate does not go that far.

[24] As I have come to the conclusion that all of the proceeding beyond the adjournment application was inappropriate and that orders should be made reflecting that view, it is unnecessary to decide this issue finally.

Reasonable Suspicion Must Attach to the Goods Not the Person

In assessing the strength or weakness of the prosecution case, you will need to (in part) assess whether there is the presence or absence of "reasonable suspicion". In engaging in this exercise it is very important to bear in mind that the reasonable suspicion must attach to the goods and not the person or persons the subject of police inquiry. Defence practitioners should be particularly diligent with this issue as many general duties police do not understand this principle and will often get it wrong; bringing a charge that cannot be justified on the evidence.

Consider the following example – police see a young man riding a bike down the street. He is well known to police for a range of different types of offences. Police stop the young man, and ask him who owns the bike. He refuses to give a definitive answer. Police say they want him to hand over the bike so that they can conduct further enquires. The young man protested –with "Fuck off; you're not taking the bike". Police then seek to arrest him for goods in personal custody.

The cases which bear out this principle are the South Australian decisions of *O'Sullivan v Tregaskis* [1948] SASR 12 and *Yeo v Capper* [1964] SASR 1

Standard of Proof – Satisfied Beyond Reasonable Doubt it is Proper to Entertain a Reasonable Suspicion

So what do the prosecution have to prove? Generally the criminal standard of proof is proof beyond reasonable doubt. The various subsections under s 527C, however, deal with offences pertaining to the existence of a reasonable suspicion. It is not required to prove that the thing "***is*** reasonably suspected…", but rather all that is required is that the thing "***may be*** reasonably suspected…" As Kirby P. pointed out in *Anderson v Judges of the District Court* (1992) 27 NSWLR 702 at 714:

"The word 'may' falls short of 'is'. The word 'suspects' falls short of 'known' or even 'convinced' or 'shown'."

Feeling confused?? Fortunately the decided cases have resolved the matter.

The issue of what standard of proof the prosecution must meet in order to succeed was considered carefully by Kirby P. in *Anderson v Judges of the District Court* (1992) 27 NSWLR 701 at 715. He addressed the conundrum in the following terms:

"How a level of thought which is qualified by what 'may' be (and does not have to reach beyond what is 'suspected') can be established beyond reasonable doubt is not entirely clear. But the section exists and has survived for more than a century in substantially the same form. It must therefore be given meaning. Presumably the criminal onus and the words of the section must be reconciled by saying that the court before which the person is charged must be satisfied beyond reasonable doubt that the thing in question may reasonably be suspected of being stolen or otherwise unlawfully obtained."

A similar analysis of the standard of proof was arrived at in *Morris v Russell* (1990) 100 FLR 386 at 392 by Kelly J who stated that:

"The question he [i.e. the magistrate] would then be required to ask himself would have been whether….he was satisfied beyond reasonable doubt that it was proper for him to entertain a reasonable suspicion…"

Warning: *be aware that there is divergent authority in South Australia which specifically rejects NSW authority on this point. In particular* Tepper v Kelly *(1987) 45 SASR 340 as affirmed since that time and most recently in* R v Zotti *[2002] SASC 164. The South Australian position is that the prosecution simply have to prove a reasonable suspicion.*

It is worth noting that in arriving at the criminal standard, the court need not be satisfied that the relevant suspicion is the only suspicion, or that the relevant suspicion is even the most likely of the possible suspicions. This point is borne out by the decision of *R v Chan* (1992) 63 A Crim R 242 in the judgment of Mahoney JA at 245:

"The application of the section is not restricted to the case in which there can only be one possibility which can reasonably be suspected as the way in which the thing was obtained….In many, if not most, cases more than one suspicion could be entertained. It is not required that the Court determine what is the most likely of the possible suspicions."

Further, the court need not be satisfied as to the commission of a specific or even general offence. Abadee J in *R v Chan* at 253 stated:

"There is no necessity for the prosecution to point to the commission of a specific or general offence. Authority does not support such a proposition and it indeed appears to be clearly against it….In Dunleavey v Dempsey *(1916) 18 WALR 90, Burnside J held that there was no requirement to prove any actual offence in connection with the goods."*

Time for Applying the Standard of Proof

Another common error amongst defence practitioners is to *incorrectly assume* that the reasonable suspicion is that held by the police officer at the time of the arrest.

The true position at law is that the time to assess the reasonable suspicion (of the court) is at the time of the conduct of the hearing before the court. It is whether the court entertains a reasonable suspicion (at the time of the hearing). As such the suspicion of the police officer (save for issues of lawfulness of arrest,etc) is irrelevant in that it whilst it may assist or detract from the prosecution case in an evidentiary sense, it is not in any way an element of any of the offences available to be prosecuted under s 527C.

The modern day origins of the test being centred on the court at the time of the hearing (and not the police officer at the time of arrest) can be traced back to the decision in *Ex Parte Patmoy re Jack* (1944) 44 SR (NSW) 351. This decision has been affirmed on several occasions since it was first handed down. Two succinct statements in more modern day case laws include Gleeson CJ in *English* (1989) 44 A Crim R 273 and Kirby P in *Anderson v Judges of the District Court (*1992) 27 NSWLR 701.

In *English* (1989) 44 A Crim R 273 Gleeson CJ stated at 277:

"It is now settled law in this State that when a magistrate deals with a charge of goods in custody it is the duty of the magistrate to decide whether he is satisfied, at the time of his decision, that it is then proper to entertain a reasonable suspicion that the goods were stolen or otherwise unlawfully obtained."

Similarly in *Anderson v Judges of the District Court* (1992) 27 NSWLR 701, Kirby P. at 714 stated:

"The suspicion must be reasonably held. It must not be determined by the subjective beliefs of the police at the time but according to an objective criterion determined by the Court before whom the accused stands charged."

It is important to note that given the above test, it matters not whether the evidence upon which the court relies in considering the matter is the same as that which was available to the police officer at the time. This point was highlighted by Hunt CJ in *R v Buckett* (1995) 79 A Crim R 302 at 307.

Onus of Proof – the First and Second Limbs of May v O'Sulllivan Applied

The "first limb" of *May v O'Sullivan* (1955) 92 CLR 654 is the issue of whether there is a prima facie case. The "second limb" is the issue of whether there is proof beyond reasonable doubt.

It is incorrect to say that once the prosecution has established a prima facie case in matter of goods in custody the onus of proof shifts to the defendant in some way. This misapprehension is a common mistake amongst magistrates, prosecutors, and defence practitioners and is borne of a misreading of subsection (2) and its role in the legislative scheme of s 527C. The common misapprehension referred to above is the very same as the error made by Herron DCJ at first instance in *Anderson v Judges of the District Court* (1992) 27 NSWLR 201. Similarly the ACT Supreme Court in *Fong v Ranse* [1999] ACTSC 125 Miles CJ at [16].

The prosecution bears the onus from first to last in any criminal prosecution. What may amount to a prima facie case may not necessarily constitute proof beyond reasonable doubt.

The position is no different in a matter of Goods in Custody. Evidence may barely be capable (taken at its highest) of sustaining a prima facie case, yet fall short of providing satisfaction that the prosecution has discharged the requisite standard of proof.

Knowledge – How and When Does Subsection (2) Come into Play?

Whilst there is a mental element pertaining to the form of custody charged, there is no essential mental element that the prosecution must establish pertaining to the defendant entertaining any level of suspicion (whether reasonable or otherwise) in order to establish their case. This is because a defendant may or may not seek to avail themselves of the available defence in subs (2).

But for subs (2), the prosecution case is complete once it has sufficient evidence to satisfy a court beyond reasonable doubt that:

i. that the accused was party to the type of custody alleged; and
ii. the court should be satisfied beyond reasonable doubt that it is proper (at the time of the hearing) to entertain a reasonable suspicion that the thing referred to in the charge was either stolen or otherwise unlawfully obtained.

It is only when the prosecution case reaches this point (which is NOT mere prima facie) that subs (2) has any potential work to do.

Subs (2) provides the defendant with an opportunity to escape otherwise certain criminal liability by satisfying the court (on the balance of probabilities) that he or she had no reasonable grounds for suspecting that the thing referred to in the charge was stolen or otherwise unlawfully obtained. The defence goes to the state of mind of the defendant at the time of custody (notice "had") and not the objective reasonableness or otherwise of the suspicion of the court at the time of conducting the hearing in determining the matter.

Similarly subsection (2) does not require the defendant to show that there was no reasonable suspicion, or that the goods were lawfully obtained. These line of defence really goes to the aspects of the reasonable suspicion itself before subs (2) is capable of being in issue. The defence in subs (2) is a defence available to the defendant once the case for the prosecution is otherwise proven beyond reasonable doubt.

The above matters were outlined succinctly in the decision of *R v Buckett* (1995) 79 A Crim R 302 in the judgment of Hunt CJ at CL at 307-308 and further authority cited therein:

"…the offence of things in custody as it is presently formulated in s 527C of the Crimes Act provides a defence to the person charged if he satisfies the court that he had no reasonable grounds for suspecting that the things in his custody were stolen or otherwise unlawfully obtained. The effect of this statutory framework is thus that the state of knowledge of the person charged as to the provenance of the things in his custody is irrelevant to the prosecution case; but if the court is satisfied beyond reasonable doubt upon the state of the evidence before it that those things may be reasonable suspected of being stolen or otherwise being unlawfully obtained, the person charged must, in order to escape conviction, discharge the lesser civil onus upon him of satisfying the court that he had no reasonable grounds for suspecting that they were stolen or unlawfully obtained…"

Goods in Custody of Money

Bank notes are "things" for the purposes of s 527C - see *R v Dittmar* [1973] 1 NSWLR 722, Kerr CJ at 724. They should be referred to in the charge not as to their total value but as individual items (e.g. "20 x $50 notes, 30 x $20 notes" – and not "$1,600 in bank notes"). The fact that this is not done does not, however, invalidate the charge (see *Edens v Cleary* [1975] 1 NSWLR 278).

Note that in relation to a charge of goods in custody of money it is the physical bank notes as pieces of polymer or coin that are the "thing" the subject of the charge, and not money as a unit of currency or measure of value. For example, if a bundle for bank notes is exchanged for other bank notes through an otherwise legitimate transaction through a bookmaker, casino, bank etc., the new bundle of notes will not be sufficient to sustain a charge of goods in personal custody as they are a new "thing" not unlawfully obtained. The position in this regard is borne out by the decisions of the High Court of Australia in *Grant v R* (1980) 147 CLR 503 and the Supreme Court of Victoria in *Brebner v Seager* [1926] VLR 166.The position would be different however, if a charge was brought under Proceeds of Crime legislation.

Note also, that in all cases (and especially in cases involving money) it is open to the court to be satisfied beyond reasonable doubt to some of the items (or money) charged but not others – see *Edens v Cleary* [1975] 1 NSWLR 278, *Gough v Braden* (1991) 55 A Crim R 92.

Variances in the Information

Be aware of the law pertaining to variances. A full discussion of this area of the law is beyond the scope of this paper. Refer to the Butterworths commentary in relation to Criminal Procedure Act s 16(2)(b).

Put in very simplest terms, a variance is where some non-essential detail in the charge is changed or; being at odds with the evidence adduced, is disregarded. Changing the elements of an offence is NOT a variance and will not save the prosecution from an otherwise doomed failure of their case. In the context of Goods in Custody charges, any application by the prosecution to "amend" a charge from one subsection of s 527C to a different subsection after the time limitation has expired should be vigorously objected to. This is because they are not truly "amending" the existing charge but rather are bringing a fresh charge out of time. Section 65 will not save them (regardless of what they may try to say).

Time Limits – Watch Your Step

Criminal Procedure Act s 179 provides a general time limit of six months for the laying of an information in relation to a purely summary matter, unless some other time limitation has been stipulated in law.

Be aware of this time limit. Prosecutors (and more particularly police OIC's) often make mistakes. A classic example is when the prosecutor suddenly realises that they lack sufficient evidence to establish some other dishonesty charge (e.g. receiving or disposing), or alternatively belatedly realises (e.g. on the day of the hearing) that the wrong subsection (and therefore the wrong offence) has been charged under s 527C. Do not allow the prosecution to lay a fresh charge of Goods in Custody out of time. Look for these mistakes at the first mention date whenever you take instructions on Goods in Custody matter. A hearing date for a technically deficient charge more

than six months after the date of the alleged offence will deprive the prosecution of correcting their mistake and charging an appropriate offence from amongst the four alternative goods in custody offences. Knowing something about time delays for hearing dates in the court in which you are appearing will also help. If you don't know the current delay for a hearing date; ask another defence practitioner (or even ask the prosecutor if you are feeling cheeky!!), or listen to the dates being given for other matters. You are perfectly entitled to take full forensic advantage of a time delay – you are not under any obligation to disclose your forensic advantage prior to the (too late for them) day of hearing. Do not, however, falsely announce a date within time as being "not suitable" if it otherwise is; as this is misleading the court – a gravely serious and entirely unethical matter.

Alternatively, if you sense that your client is facing a strong prosecution case for another dishonesty offence, (such as break enter & steal, stealing, receiving or disposing etc) and you contemplate that your client may wish to consider a plea bargain to goods in custody at some future time, it may be appropriate to approach the prosecution and (with appropriate instructions) encourage them to lay a "back up" charge of goods in custody, in order to leave your client's options open more than six months down the track.

Note that Section 527C (1A) stipulates that the time limit for any goods in custody charge concerning a motor vehicle is 2 years. All other "things" the subject of a goods in custody charge are subject to the general time limit of six months as specified in *Criminal Procedure Act* s 179.

The Common Mistakes

The following is a list of common mistakes made by practitioners with respect to this type of offence. The answers to these mistakes can be found in the preceding content of this paper and may assist as a "self-assessment" / quick revision tool:

1. Failing to understand that the Section 527C outlines four separate offences.
2. Not understanding that custody is NOT the same of possession.
3. Not understanding the decision in *English* (1989) 44 A Crim R 273 regarding the nature of personal custody – custody and arrest must coincide and co-exist.
4. Not understanding the difference between subsection 1(b) and subsection 1(d)
5. Not Understanding Custody on Premises
6. Not understanding the principle in *Filippetti* (1986) 13 A Crim R 335 and how it might be of assistance in a charge of Goods In Custody in or on Premises.
7. Failing to understand that the suspicion must attach to the goods, not the person.
8. Not understanding the Standard of Proof
9. Not understanding the Onus of Proof
10. Believing that the relevant reasonable suspicion is that of the arresting police officer

11. Believing that the time for assessing reasonable suspicion is at the time of arrest and on the evidence available at the time of arrest.

12. Not understanding Goods in Custody of Money.

13. Allowing the prosecutor or magistrate to "amend" or treat as a variance the incorrect charge to the correct charge (given the evidence) mid-hearing.

14. Failing to take advantage of the time limit

15. Failing to have the prosecution lay an appropriate back up charge (on instructions) of Goods In Custody within time.

I hope that the above has been of some help. I have copies of all the cases referred to in this paper and am happy to forward copies of unreported or "hard to get" cases on request. Should you have any questions please do not hesitate to contact me on **0408 277 374**. If you have difficulties catching me, I am happy to deal with questions submitted by email. I am typically able to respond within 24 hours.

My email address remains dark dot menace at forbeschambers dot com dot au.

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