

*DP v Burgoyne* [2005] NTSC 64

PARTIES: DP  
v  
BURGOYNE, Robert Roland

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE  
TERRITORY EXERCISING  
APPELLATE JURISDICTION

FILE NO: JA 26 of 2005 (20426796)

DELIVERED: 7 October 2005

HEARING DATES: 23 September 2005

JUDGMENT OF: SOUTHWOOD J

**CATCHWORDS:**

MAGISTRATES – Appeals from Magistrates  
CRIMINAL LAW – Miscellaneous offences

Appeal against conviction – whether magistrate erred in finding that the property the subject of the charge was reasonably suspected of having been otherwise unlawfully obtained – appeal allowed – finding of guilt quashed – finding of not guilty substituted

*Grant v R* (1980) 35 ALR 97, applied

**REPRESENTATION:**

*Counsel:*

Appellant: R Goldflam  
Respondent: C Roberts

*Solicitors:*

Appellant: Northern Territory Legal Aid  
Commission  
Respondent: Office of the Director of Public  
Prosecutions

Judgment category classification: B  
Judgment ID Number: Sou0511  
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IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT ALICE SPRINGS

*DP v Burgoyne* [2005] NTSC 64  
No. JA 26 of 2005 (20426796)

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal  
against the sentence of the Court of  
Summary Jurisdiction at Alice Springs

BETWEEN:

**DP**  
Appellant

AND:

**ROBERT ROLAND BURGOYNE**  
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 7 October 2005)

**INTRODUCTION**

- [1] The appellant appeals against his conviction in the Court of Summary Jurisdiction. On 27 June 2005 the appellant was convicted of being a person who contrary to s 61(2) Summary Offences Act had in his custody \$11,050 cash which was reasonably suspected by police of having been obtained from the sale of cannabis. The appeal was commenced by notice of appeal dated 22 July 2005.

[2] On 23 September 2005 the appellant was granted leave to amend the notice of appeal. The appellant only relies on one amended ground of appeal. The amended ground of appeal is that the learned magistrate erred in finding that the property the subject of the charge against the appellant was reasonably suspected of having been otherwise unlawfully obtained.

### **THE ISSUE**

[3] The principle issue in the appeal is whether the prosecution discharged their onus of proving that all of the \$11,050 cash that the appellant had in his custody on 24 November 2004 was reasonably suspected of having been obtained from the sale of cannabis. In my opinion they did not do so. The learned magistrate erred in finding that she was satisfied that at a time prior to making the charge against the appellant the police had a reasonable suspicion that all of the sum of \$11,050 had otherwise been unlawfully obtained. Such a finding is against the weight of the evidence. The appeal should succeed.

### **THE CHARGE OF UNLAWFUL POSSESSION**

[4] On 6 January 2005 the appellant was charged on complaint. The charge was that contrary to s 61 Summary Offences Act on 24 November 2004 at Alice Springs, the appellant did have in his custody personal property, namely \$10,930, which at the time before making the charge was reasonably suspected of having stolen or otherwise unlawfully obtained. On 15 April 2005 the amount of money specified in the charge was amended on the

application of the prosecution. The appellant consented to the amendment.  
The sum of money was increased from \$10,930 to \$11,050.

[5] The police witnesses called at the trial in the Court of Summary Jurisdiction gave evidence that they suspected that the sum of \$11,050 had been obtained from the sale of cannabis. They did not suspect the money had been unlawfully obtained in any other manner.

[6] S 61 of the Summary Offences Act provides as follows:

“(1) In this section –

"personal property" includes money in cash or cheque form, or deposited in an ADI account or other account;

"premises" includes a structure, building, vehicle, vessel, aircraft, hovercraft, land or place.

(2) A person who –

(a) has in that person's custody any personal property;

(b) has in the custody of another person any personal property;

(c) has in or on any premises any personal property; or

(d) gives any personal property to a person who is not lawfully entitled to it,

being personal property which, at any time before the making of a charge for an offence against this section in respect of the personal property, is reasonably suspected of having been stolen or otherwise unlawfully obtained, is guilty of an offence.

Penalty: \$2,000 or imprisonment for 12 months.

(3) It is a defence to a charge for an offence against subsection (2) if the defendant gives to the court a satisfactory account –

(a) as to how the defendant obtained the personal property referred to in the charge; and

(b) of the custody of the personal property by the defendant after it was obtained by him or her for each period during which the defendant had custody of the personal property.”

[7] As the majority of the High Court said in *Grant v R* (1980) 35 ALR 97 at 100 of an equivalent section in other legislation, the section is of an extraordinarily serious character in that it authorises the arrest of a person on mere suspicion, to be followed by his conviction and possible imprisonment unless he gives the court a satisfactory account of how he obtained the personal property referred to in the charge. Consequently the courts have insisted upon a strict construction of the words outlining the elements of the offence.

[8] An element of the offence that the prosecution must prove beyond reasonable doubt is that the suspicion that the money was unlawfully

obtained must be a suspicion about all of the \$11,050: *Grant v R* (supra) at 101. As to how the total sum of \$11,050 was obtained the learned magistrate found that she could not rule out that a percentage of the monies came from the sale of Indian handicrafts. In her reasons she stated that, “I would be prepared to accept that a small percentage of the money came from that source...” and, “I find it impossible on the material before me to sever what may have been from the business (Indian handicrafts) and what may have been from other sources.” Such findings were the only findings that could sensibly be made by the Court of Summary Jurisdiction. There was extensive evidence that the appellant conducted an Indian handicrafts business including evidence of business records and merchandise being found on the appellant’s premises and the charge against the appellant referred to all Australian currency that was found at the appellant’s premises. A number of police witnesses who gave evidence said during their testimony that the amount of stock that the appellant had on his premises and the records which he produced to police led them to form the belief that the appellant was in the business of selling Indian artefacts. However, prior to charging the appellant the police did not make adequate enquiries to try and assess what proportion of the \$11,050 that they seized related to the appellant’s Indian handicrafts business and what proportion of the money was unlawfully obtained from the sale of cannabis. They did not make enquiries of the appellant’s sister nor did they investigate the appellant’s bank account prior to charging him.

[9] In the circumstances the Court of Summary Jurisdiction could not have been properly satisfied that the police had a reasonable suspicion that all of the \$11,050 was obtained from the sale of cannabis. Given the appellant's Indian handicrafts business it was unreasonable to suspect that all of the \$11,050 was obtained from the sale of cannabis without further investigation.

### **THE ORDERS**

[10] The appeal against conviction is allowed. The finding of guilt is quashed. A finding of not guilty is substituted for the finding of guilt.