

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)

Heard: 11th March, 1977

Delivered: 4th April, 1977

THE FULL COURT

CORAM: BURT C.J., LAVAN J., BRINSDEN J.

Appeal No. 206 of 1976

B E T W E E N:

PETER RONALD DAVIES

Appellant

-and-

ALLEN GEORGE MITCHELL

Respondent

JUDGMENT -

BURT C.J.

In my opinion the appeal should be dismissed and the order nisi discharged. I publish my reasons. BRINSDEN J., who is absent on circuit, agrees and I publish his reasons.

LAVAN J.

I agree and publish my reasons.

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B E T W E E N:

PETER RONALD DAVIES

Appellant

-and-

ALLEN GEORGE MITCHELL

Respondent

Mr. G. P. Miller appeared for the appellant.

Mr. K. G. Parker appeared for the respondent.

Authorities cited -

Chen Yin Ten v. Little (1977) 11 A.L.R. 353
 Ratten v. R. (1974) 4 A.L.R. 93
 Craig v. R. (1933) 49 C.L.R. 429 per Rich and Dixon JJ. at p. 439
 Green v. R. (1938) 61 C.L.R. 167 per Latham C.J. at pp. 174-5
 Dick v. Piller (1943) 1 K.B. 497
 Davies v. Director Public Prosecutions (1954) A.C. 378
 Peacock v. R. (1911) 13 C.L.R. 619 per Barton J. at pp. 655-6
 Thomas v. The Queen (1960) 102 C.L.R. 584
 Green v. The Queen (1971) 126 C.L.R. 28
 McGrath v. R. (1916) 18 W.A.L.R. 124
 Davies v. R. (1937) 57 C.L.R. 170 at pp. 183-5.

BURT C.J.

The appellant was convicted in a Court of Petty Sessions upon a complaint that "on the 18th day of August 1976 at City Beach he had in his possession a quantity of diamorphine, commonly known as heroin, with intent to sell or supply it to another. Contrary to s. 94G(1)(d) Police Act". He pleaded not guilty but after trial he was convicted and remanded to the District Court for sentence. He has not yet been sentenced. He appeals against his conviction. He seeks re-trial.

There are a number of grounds of appeal but the only ground which was pressed before us is in the order nisi formulated as follows :

"(a) The learned Magistrate's conviction of the appellant (defendant) was an error in law in that the prosecution witness, Daniel Patrick Connor Cox (material parts of whose evidence were accepted by the learned Magistrate as the truth) has since the hearing of the charge against the appellant (defendant) admitted that the sworn testimony he gave before the learned Magistrate at the Court of Petty Sessions on the 10th and 22nd days of November 1976 was untrue and deliberately given untruthfully."

The facts must be looked to so as to place that ground in its proper context.

At all material times the appellant, a man named Cox and one Susan Adamiak were living in a house situated at 20 Dupont Avenue, City Beach. The appellant was the occupier of the house and Cox was staying there. On 18th August 1976, Detectives Mitchell, Wojtasiak and Rowe armed with a search warrant went to those premises and in the course of the search Det. Rowe found a kitchen cannister within which were seven small plastic bags each containing a quantity of heroin - 151.52 grams in all. The cannister was found buried in the garden.

The evidence implicating the appellant being evidence which if accepted would lead one to conclude that he was in possession of the heroin came from two sources. Evidence was given by Detectives Mitchell and Wojtasiak that having found the heroin which happened at some time not long after 6 o'clock in the evening, they waited at the premises until 10.40 p.m. when the appellant arrived there. Their evidence was that the appellant was shown the cannister and told that it was then thought to contain heroin and he was asked if he knew anything about it. His initial reply was: "I don't know what you are talking about". Later, when told that all the people - himself, Cox and Susan Adamiak - living in the house were under suspicion he said: "Sue and Rick have got nothing to do with it. It is mine". He was then cautioned by Mitchell and asked by him: "Who buried it?", to which he replied "Me". The appellant was then taken to the Drug Squad office. The evidence given by Det. Mitchell, as noted by the Magistrate, of what happened there is as follows:

"I reminded the accused of my previous caution and I said, to him: 'Do you have a problem with drugs?'

He said: 'I have used grass but I don't think there is anything wrong with that.'

I said: 'Have you used heroin?'

He said: 'No.'

I said: 'There is a lot of heroin. What were you going to do with it?'

He said: 'It was going to be sold.'

I said: 'Did you have any more heroin at any stage?'

He said: 'That is about half'.

I said: 'Where did you get the plastic jar?'

He said: 'It is one of Sue's from the kitchen'

I said: 'Did she know what you were going to do with the jar?'

He said: 'No. I told you Sue is cool.'

I said: 'Peter there is a lot of heroin here and you have told me that you don't use it. The heroin would be worth at least \$50,000'

He said: 'It was for sale, I'll tell you how much I was going to make. It was \$1,000 at the most.'

I said: 'That does not sound right to me. It is the truth. I know you work why do you turn to this?'

He said: 'Sue would like to travel and I thought we would get there sooner.'

I cautioned the accused again and asked if he wished to make a statement.

The accused declined to make a statement. "

All of this was denied by the appellant at his trial.

The other evidence implicating the appellant was given by Cox. His evidence was that the heroin had been brought to the house by a man named Trenchard. This, he says, happened late in July or early in August. The appellant, he said, then took possession of it and placed it - the seven plastic bags - in a kitchen cannister and buried it in the garden and thereafter he had from time to time changed the position of the cannister by digging it up and burying it in a different place. Cox went on to say that from time to time he would himself dig up the cannister and without opening the plastic bags he would remove a small amount of the heroin from each bag and that he buried what he had taken in the sandhills near the beach. Cox admitted that he was addicted to heroin. Initially Cox was charged with being in possession with intent to supply, this charge apparently being lai

upon the basis that he was in possession of the entire parcel. This charge was later dropped and he was charged with and before the appellant's trial he had been convicted of and sentenced for being in possession of the heroin which he had removed from the cannister and buried on the beach.

The police took a statement from Cox on 20th August. This was, in effect, his proof of evidence and at the appellant's trial and in substance he swore up to its truth. Prior to trial, however, on 24th September, he signed a statement which appears to have been in the handwriting of the appellant. By that statement he admits that he is an heroin addict and says that "the heroin found was for my use only and at no stage were any of the persons living at 20 Dupont Avenue implicated in any way". Having signed the statement Cox was taken by the appellant and by Trenchard to see the appellant's solicitor. By chance the solicitor was not available and Cox was seen by another solicitor whose office was nearby. That solicitor in the absence of the appellant and of Trenchard took a further statement from Cox. This was, so far as that solicitor could see, given freely and again it exonerated the appellant. The statement was typed, and signed by Cox. Having given that statement Cox was taken by the appellant and by Trenchard to the office of yet another solicitor. He there gave and signed another statement. This purports to be an affidavit although it was not sworn before a Commissioner. In it he complains of being beaten up by the police and says that "the statement" by which, as I understand it, he means the first written statement given by him to the police, was made "so that I could avoid further physical punishment".

Each of the last three statements to which I have referred were in the hands of the appellant's counsel at his trial and as one can imagine Cox was submitted to a very close cross-examination upon them. Yet Cox steadfastly adhered to the evidence which he had given. His statements to the contrary, he said, were untrue and in substance his explanation for making those statements was that he was being threatened, particularly by Trenchard, and he was scared.

Clearly the evidence given by Cox on the appellant's trial called for the closest scrutiny. He was, putting it in neutral terms, very closely associated with the heroin which had been found in the garden. At the beginning he had been charged with being in possession of that heroin. Later this charge was withdrawn and a charge of a far less serious nature was substituted. This could lend support to the suggestion that he had altered his statement so as to achieve that end either on his own initiative or, in the vernacular, because he had made a deal with the police which involved his implicating the appellant. The making of such inconsistent statements one of which purporting to be on oath, was in itself enough to cast very serious doubt upon his credit. And one adds to all that the fact that he was a self-confessed heroin addict. One could hardly imagine any court acting upon Cox's word alone to convict anyone of anything.

The learned Magistrate was well aware of all these things. In his reasons he says: "Without a doubt Cox's evidence must be tested with great care. He gave me the impression he was a weak, inept man of no great moral virtue. ...". Having so warned himself he nevertheless "found that in parts of his evidence material to the complainant's case he was persuasive and I believe him". In passing, upon one specific matter of conflict between Cox's evidence and the evidence of the appellant he did not believe the appellant, his finding being that "he did not tell the truth".

But it is important to appreciate that he did not convict the appellant upon Cox's evidence alone as he expressly accepted the evidence of each Detective Mitchell and Detective Wojtasiak. Of the former he says: "Detective Mitchell in my view accurately recounted the events in the course of which Davies, I find, admitted the heroin was his". Of the latter he says: "I am satisfied his evidence of Davies' confession was factual".

It is, I think, important to appreciate that at that point of time, that is to say, at the time at which the decision was given and this the appellant's counsel conceded before us, "no prima facie case of error or mistake in law or fact on the part of" the Magistrate could be shown and hence as things then stood no ground existed for the making of an order to review.

However the matter was not to rest there. On 20th December 1976, Cox, who was then a patient in the Mount Lawley Annexe of the Royal Perth Hospital, contacted the appellant's solicitor and told him that he had something urgent to tell him. The solicitor attended upon him and Cox then gave him a statement in Cox's handwriting in which he said, inter alia, that: "During the trial of Mr. P.B. Davies while being under oath I openly lied to protect myself". The solicitor then took a further statement from Cox in which that confession to perjury was repeated. Those statements have been exhibited to an affidavit sworn by the solicitor and they were received on the hearing of the appeal. But that was not the end of the matter. The Crown tendered to us yet another statement by Cox - an affidavit - in which he says that prior to his giving the statements to the appellant's solicitor he had received a visit from two men who were unknown to him who told him that "they were going to hurt my mother and father unless I took the blame" and that he then changed his story "because I was frightened for myself and my parents". In that affidavit he says that: "The evidence I gave in Court at the hearing was the truth".

It is the giving of the two post-trial statements to the solicitor which is now said to reveal the "error in law" referred to in the ground of appeal set out earlier in these reasons. For myself I adhere to the doubt which I have previously expressed as to whether additional evidence of this character - I refrain from using the word "fresh" which has acquired a somewhat special meaning in this context - can, within the meaning of s. 197(1) of the Justices Act, of itself reveal error of fact or of law on the part of the Magistrate. There is some authority for the view that the question, that is to say, whether or not the Magistrate has made an error must appear from the materials before that Court.

Victorian Stevedoring & General Contracting Co. Pty. Ltd. and Meakes v. Dignan, (1931) 46 C.L.R. 73, and Davies and Cody v. The King, (1937) 57 C.L.R. 170, per Latham C.J. at p. 172. This Court upon an appeal brought to it by way of an order nisi to review may notwithstanding error discharge the order if "it considers that no substantial miscarriage of justice has occurred". The converse is not true. It has no power to set aside a conviction following a trial without error upon the general ground which may be made to appear upon the production of further evidence whether technically it is "fresh" or not that a miscarriage of justice has been made to appear and in this respect there is, as it seems to me, a fundamental difference between an appeal brought to the Full Court under the Justices Act by way of order nisi to review and an appeal brought to the Court of Criminal Appeal under the provisions of s. 689(1) of the Criminal Code. If this is so, then it may reveal a case for amending the law particularly as now a Court of Petty Sessions presided over by a Magistrate is no longer restricted to sitting upon judgment for offences which can in terms of punishment be fairly described as simple.

Having expressed those doubts I think I should, in this particular case, without resolving them by decision, put them on one side as I would not like it to be thought that the decision in the appeal has turned upon that question.

The appellant's counsel in his argument before us submitted that an authoritative statement of the law applicable to such a case as this assuming that we are to deal with it as if we were sitting as a Court of Criminal Appeal, is to be found in the decision of the High Court in Ratten v. The Queen, (1974) 48 A.L.J.R. 380, and he relied upon the decision of the High Court in Davies and Cody v. The Queen (above) as being an example of the application of those principles to a case in which a prosecution witness has subsequently confessed to having committed perjury at the trial.

Both submissions are, of course, correct, but that is not to say that the application of the principles to the facts of this case should produce the same result as in the case of Davies and Cody. The circumstances of that case were very special indeed. The issue of identity was central to that case and it came from three sources being the evidence of eye witnesses, the evidence of the youth who had repaired the pistol and the evidence of the man Stevens, he being the person who subsequently confessed to having committed perjury. The appellants had been arrested nine months after the crime had been committed. The evidence of identity as it came from the first two sources was far from satisfactory and as found by the High Court, the trial Judge failed adequately to warn the jury of the dangers involved in acting upon it. The evidence of Stevens on its face was not open to the same objection and if "believed would of course have carried the case against the prisoners the whole distance". The importance of the evidence of Stevens in that case appears from the following extract from the Court's reasons for judgment at pp. 184-185 of the report, as follows: "But it must be remembered that the Crown chose to rely upon the man's evidence and press its probative value, and the judge's charge does not advise the jury to reject his testimony. It is now known that it is completely untrustworthy, and ought not to be allowed to enter into the reasons for any verdict of guilty. Whether the jury believed his evidence or gave any weight to it in fact cannot be known, but all the other evidence implicating the accused depended upon evidence of identity, and, in this case, the jury was not, as we have already said, adequately instructed with respect to the matters which they should consider in determining the value of that evidence. In these particular circumstances, the facts relating to Stevens' evidence are sufficient, in our view, to entitle the accused to a new trial".

The present case can be distinguished from the case of Davies and Cody in a number of respects. In this case we have the reasons for judgment of a Magistrate and from those reasons it appears that he considered Cox's evidence knowing that he was a "weak inept man of no great moral virtue"; knowing that he was a heroin addict and most importantly, knowing that he had made prior statements which in terms exonerated the appellant. Knowing these things he tested Cox's evidence with great care and having done so he nevertheless believed him upon matters material to the complainant's case. To be told that after the trial Cox had again made conflicting statements would not seem to me likely to displace that belief and it would not be reasonable to suppose that it would do so. But even more importantly in my opinion, the Magistrate accepted the evidence of each of the detectives to which I have referred and there is nothing to suggest that his acceptance of that evidence was in any way dependent upon his acceptance of any evidence which Cox had given. It was, I think, a truly independent source of evidence which in itself could sustain the conviction. Hence in my opinion if this Court had power to set aside the conviction upon the general ground that there had been a miscarriage of justice, no miscarriage of justice has been shown to have occurred and I would accordingly dismiss the appeal and discharge the order nisi.

FULL COURT

CORAM: BURT C.J., LAVAN J. and BRINSDEN J.

Appeal No. 206 of 1976

B E T W E E N:

PETER RONALD DAVIES

Appellant
(Defendant)

- and -

ALLEN GEORGE MITCHELL

Respondent
(Complainant)

LAVAN S.P.J.

In the Court of Petty Sessions at Perth the appellant, Peter Ronald Davies was charged before Mr. C.N. Boys S.M. that on the 18th August 1976 at City Beach he had in his possession a quantity of diamorphine, commonly known as heroin, with intent to supply to another.

The complaint was laid under S.94G(1)(d) of the Police Act 1892 - 1976 which provides that if a person has in his possession the drug with intent to sell or supply to another he is guilty of an offence. This is the return of an order nisi to review, calling upon the respondent to show cause why the appellant's conviction should not be set aside. The order nisi was granted on a number of grounds, mainly relating to the credibility of a witness named Cox who testified against the appellant at his trial but the ground of appeal most strongly urged and in fact the only ground of any substance is that:

"The learned Magistrate's conviction of the appellant was wrong in law in that the prosecution witness Daniel Patrick Connor Cox (material parts of whose evidence were accepted by the learned Magistrate as the truth) has since the hearing of the charge against the appellant admitted that the sworn testimony he gave before the learned Magistrate at the Court of Petty Sessions..... was untrue and deliberately given untruthfully."

The undisputed facts relative to the charge are that in August 1976 premises at 20 Dupont Street, City Beach were occupied by the appellant, a young woman named Susan Adamiak and Cox. On 18th August officers of the Drug Squad - Detectives Mitchell, Wojtasiak and Rowe - in executing a search warrant at the premises, found buried in the garden of the house a kitchen cannister containing seven plastic bags, each containing a substantial quantity of heroin. A further quantity was found buried in a sandhill at a nearby beach. Both the appellant and Cox were subsequently arrested and charged with a breach of S.94G(1)(d) of the Police Act. The intent to supply alleged in the complaint was presumed from the quantity of the drug found and although this was not spelt out it is not disputed that it was well in excess of the permitted trafficable amount.

The charge against the appellant was commenced in the Court of Petty Sessions on 10th November and the appellant pleaded not guilty. Cox was tendered as a prosecution witness although at the time he was awaiting trial on a similar charge.

Before that date Cox had made a number of conflicting statements concerning the charge against the appellant.

On 20th August 1976 he had given a statement to Det. Mitchell in which he implicated the appellant as the owner of the heroin seized by the police. He also admitted his own possession of a small quantity of that drug. A few days later he signed a further statement which was in the handwriting of the appellant, in which he accepted full responsibility for possession of the drug and entirely exculpated the appellant of responsibility. On the same day at the office of the appellant's solicitor he made another statement to an independent legal practitioner to the same effect. Several days later he made a further statement at the office of other solicitors again admitting that the heroin in question belonged to him alone.

At the trial of the appellant Det. Mitchell, whose testimony was supported by that of Det. Wojtasiak, gave evidence that the appellant, although initially denying any knowledge of the heroin concealed in the City Beach premises, had later admitted that he had personally acquired the drug and that neither Susan Adamiak or Cox were in any way involved; he had also admitted that he had acquired the drug for the purpose of resale.

The only other evidence submitted by the prosecution was that of Cox. Cox informed the Court that he was aware that the drug in question had been brought to the house by a man named Trenchard who had given it to the appellant. Although the witness had not seen the package changing hands he was present when the appellant had subsequently placed it in a container and buried it in the garden. Cox admitted that some days later he had unearthed the cannister and on opening it had discovered that it contained a number of plastic bags containing heroin. He was himself a heroin addict and had removed from each package a small quantity of the drug which he had subsequently secreted in a sandhill at the beach. Subsequently he had seen the appellant move the cannister to different parts of the garden on two occasions; that was the cannister which was discovered on the premises by the members of the Drug Squad. Cox told the Court that after his arrest and while he was on remand in Fremantle Prison he had been approached by the appellant who had requested him to accept full responsibility for possessing the drug but he had refused. He further stated that after his release on bail both the appellant and Trenchard had requested that he should accept full responsibility and threatened him with violence if he refused. In consequence he had made a number of statements which conflicted with his earlier statement to the police which had implicated the appellant.

Cox was vigorously cross-examined on his various statements but adhered to his evidence in chief that the drug in question belonged to the appellant and that the various statements made by him to the contrary were untrue and made under duress.

The appellant gave evidence in his defence and denied that he had been involved with the use or possession of narcotic drugs; specifically he denied that he was aware that there was heroin concealed on the premises in Dupont Street until it was shown to him by the Drug Squad detectives. He denied that he had made a statement to Det. Mitchell to the contrary effect. The appellant also stated that in the remand yard at Fremantle Prison, Cox had admitted to him that the heroin in question belonged to him. After his release on bail he had, in the company of Trenchard, visited Cox and at Cox's dictation had written a statement which exculpated him and which Cox voluntarily signed. On the same day Cox had gone with him to his solicitor's office where he had made a statement confirming that the heroin belonged to him. Some days later Cox had been taken to Trenchard's solicitors where he had made a similar statement exonerating the appellant. He denied that any of the latter statements had been made by Cox under duress.

The Magistrate reserved his decision. On 24th November he convicted the appellant and published his reasons.

The appellant argues that the credibility of Cox, who was a key prosecution witness, was by reason of his conduct throughout, so suspect that the Magistrate was wrong in finding that the charge against the appellant had been proved to the required standard of persuasion and in my opinion it could be safely argued that if the case for the prosecution depended entirely upon his evidence, the appellant's conviction could not be supported. Quite apart from his personal involvement which would provide an enducement for him to lay the blame at the door of the appellant, his seeming willingness to change his account of the events which led to the charge must have inevitable gone a long way to damaging greatly if not destroying his credibility and indeed the Magistrate recognised that this was the case. He did not hesitate to brand Cox as a "weak inept man of no great moral virtue", he did not hesitate to express the view that "without a doubt, Cox's evidence must be tested with great care" but in spite of such an opinion he was not prepared to eject his evidence in toto, finding that in spite of the various contradictions

there were parts of his evidence which were acceptable. That it is apparent from the Magistrate's reasons that in deciding to convict the appellant the evidence upon which he depended mainly was that of Det. Mitchell. The learned Magistrate saw fit to be mildly critical of the evidence of Det. Wojtasiak but he accepted the evidence of Det. Mitchell as being accurate and truthful, particularly in relation to his account of the admissions made by the appellant. In a word, putting to one side the evidentiary value or lack of it, of Cox's testimony, the Magistrate preferred the evidence of Det. Mitchell to that of the appellant so that as matters then stood, no ground appeared to exist for challenging the conviction of the appellant.

However, as if to confuse the issue still further, after the conviction of the appellant, Cox made two further statements. On 20th December he wrote and signed a statement to the effect that the evidence which he had given in Court implicating the appellant was false and that earlier statements made by him that the heroin belonged to him were true. On the same day in the presence of the appellant's solicitor, he signed a further statement again admitting his guilt and confirming that the evidence which he had given had been perjured. These were the statements which form the basis of this appeal and they were by consent submitted to and considered by the Court as part of the appellant's case.

An appeal by way of order to review is available in cases of error or mistake in law or in fact on the part of the Magistrate and it is open to doubt whether such an appeal will lie on the discovery of 'fresh' evidence. However, the issue is not raised in argument and in fact by consent the respondent submitted to the Court an affidavit sworn by Cox on 8th March 1977 denying the truth of the statements made by him on 20th December 1976 and claiming that they had been made in consequence of threats of personal violence made to him by two men who had visited him while he had been in hospital. The appeal was considered on a similar basis as if instituted under

the provisions of the Criminal Code.

The principles upon which a Court of Appeal considering such an appeal are stated by Rich and Dixon J.J. in Craig v. The King (1933) 49 C.L.R. 429 at p.439 and cited with approval by Menzies J. in Ratten v. The Queen (1974) 48 A.L.J.R. 380 at 386. "A Court of Criminal Appeal has thrown upon it some responsibility of examining the probative value of the fresh evidence. It cannot be said that a miscarriage has occurred unless the fresh evidence has cogency and plausibility as well as relevancy. The fresh evidence must....be of such a character that, if considered in combination with the evidence already given upon the trial the result ought in the minds of reasonable men to be affected. Such evidence should be calculated at least to remove the certainty of the prisoner's guilty which the former evidence produced."

The question for decision then is whether this Court is satisfied that the Magistrate may have had a reasonable doubt of the guilt of the appellant had the 'fresh' evidence been before him and whether the absence of such evidence was productive of a mistake of law or fact.

It can be accepted, I think, that the statements made subsequent to the trial were relevant to the matters in issue; their cogency and plausibility is however open to serious doubt but leaving that aside, can it be said that the evidence is 'fresh' in the sense that if it had been before the Magistrate at the time of the trial, it would have been likely to produce a different result. It do not think that it could. The appellant argues that the further vacillation on the part of Cox could not fail to have affected his crediblity as a witness and that the Magistrate, with the additional statements before him might well have reached the conclusion that he was incapable of belief. Had the Magistrate been originally impressed with Cox's reliability as a witness, such an argument might have been well founded, but the learned Magistrate made it quite clear that "without a doubt Cox's evidence must be treated with great care, he gave me the impression that he was a weak inept man of no great moral virtue

but I found that in parts of his evidence material to the complainant's case, he was persuasive and I believe him. In particular I accept his evidence relating to the handling of the heroin....and to the taking of small quantities by him from each of the bags in the cannister and the reason for taking it to the beach and burying it." At the time the learned Magistrate came to that conclusion he was aware that Cox had already made a number of contradictory statements and the fact that further contradictory statements were placed before him would in my view have been unlikely to have changed his opinion of Cox's credibility. Counsel for the appellant cited the decision in Davies & Cody v. R. (1937) 57 C.L.R. 170 as being a similar appeal to that under consideration and in which the appeal was successful. In Davies & Cody v. The King, the question was one of identity - whether the appellants were two of three men carrying out a robbery in the course of which a murder was committed. The Crown chose to rely for identification of the appellants on the evidence of one man, which evidence if believed was conclusive evidence of the guilt of the accused. The appellants were convicted and subsequent to trial the witness of identity at first recanted from his evidence and later withdrew his recantation. This is not such a case. Proof of the guilt of the accused did not rest on Cox; although the Magistrate indicated his acceptance of certain aspects of his evidence, in the final analysis it was on the evidence of the two detectives that the Magistrate relied, stating: "Det. Mitchell in my view accurately recounted the events in the course of which Davies, I find, admitted the heroin was his." Although critical of Det. Wojtasiak's manner in the witness box, the Magistrate was satisfied that his evidence of Davies' confession was factual. It appears to me therefore that the situation in Davies & Cody v. The King is clearly distinguishable from the present case. In my opinion the appeal should be dismissed.

Heard: 11th March, 1977

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IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)

Delivered: - 4 APR 1977

FULL COURT

CORAM: BURT C.J., LAVAN S.P.J., BRINSDEN J.

Appeal No. 206 of 1976

B E T W E E N :

PETER RONALD DAVIES

Appellant

-and-

ALLEN GEORGE MITCHELL

Respondent

BRINSDEN J.

This is the return of an order nisi to review the decision of the learned Magistrate in respect of his conviction of the appellant on 24th November 1976, in relation to a complaint heard in the Court of Petty Sessions, Perth, that the appellant on 18th August 1976, at City Beach, had in his possession a quantity of diamorphine, commonly known as heroin, with intent to sell or supply it to another contrary to the provisions of s.94G(1) (d) of the Police Act, 1892-1976, upon a number of grounds. At the hearing only one ground was pursued with vigour and that was that the learned Magistrate's conviction of the appellant was an error in law in that the prosecution witness Daniel Patrick Connor Cox (the material parts of his evidence were accepted by the learned Magistrate as truth) has since the hearing of the charge against the appellant admitted that the sworn testimony he gave before the learned Magistrate at the Court of Petty Sessions on the 10th and 22nd days of November was untrue and deliberately given untruthfully.

It appears from the notes of evidence that the appellant, Cox the appellant and Susan Adamiak were living together at 20 Dupont Street, City Beach, in August last year. On the 18th August, officers of the Drug Squad in executing a search warrant, found a large quantity of heroin buried in the garden and a further quantity buried in a sandhill at City Beach. As far as I can gather the quantity of heroin referred to in the

certificate of analysis and which was presumably the herion obtained at 20 Dupont Street amounted to 151.52 grams. The value of the herion was found by His Worship to be over \$50,000 and about \$80,000. It was suggested by counsel for the appellant that there was no evidence to support such a finding but in fact I do find such evidence in the evidence of a Mr. B. P. Kakulas, a solicitor, who said that the appellant told him the herion was valued at \$80,000 and the witness Cox confirmed that figure. The appellant was the lessee of the premises and apparently Cox was paying him approximately \$40 per week towards his board and accommodation. The appellant contended that the heroin so found on the premises did not belong to him. His evidence was that he never placed the container of heroin in the front yard where it was found by the police. He was not aware of any quantity of heroin being on or about the premises. Prior to 18th August he did not know whether Cox had any contact with the heroin. It seems therefore that until at least the discovery by the police of the heroin on the premises the appellant's story was that he did not know the heroin was on the premises and did not know that it belonged to Cox, and it certainly did not belong to him. However, two police witnesses gave evidence that the appellant admitted to them that the heroin belonged to him.

The matter came on for trial and Cox was called to give evidence. In the witness box he maintained that the heroin belonged to the appellant. He also said that he had taken, without the appellant's knowledge, small particles of heroin from each bag in the container for his own use and had hidden that heroin at City Beach where it was subsequently discovered by the police. Prior to giving evidence, however, Cox had made statements conflicting with his testimony so far as the ownership of the heroin found at 20 Dupont Street is concerned by stating that the heroin belonged to him. For the purposes of this appeal it is important to record the statements made in writing by Cox prior to his evidence. They are as follows:

- (1) On 20th August 1976, Cox made a written statement, presumably to a member of the Drug Squad in which he maintained that the heroin belonged to the appellant.

- (2) On 24th September, Cox signed a written statement made out by the appellant in which he admitted that the heroin belonged to him.
- (3) On 24th September 1976, Cox signed a written statement prepared by Mr. B.P. Kakulas admitting that the heroin belonged to him.
- (4) On 27th September 1976, Cox signed a written statement taken by an employee of the firm of solicitors Paterson & Dowding on 24th September 1976, admitting that the heroin belonged to him.

All these statements were admitted in evidence and were therefore under consideration by the Magistrate in reaching his conclusion as to the credibility of Cox. Cox's explanation for making the statements which conflicted with his oral testimony and his earlier statement of 20th August 1976 was that he was placed under threats of physical violence by the appellant and one Trenchard.

In order to complete the sequence and to explain the ground of appeal persisted in in this hearing, the following additional statement had been made by Cox:

- (5) On 20th December 1976, Cox made out a statement in his own handwriting admitting that the heroin belonged to him, that the evidence given in court was false, that the earlier statements he made stating the heroin belonged to him were true.
- (6) On 20th December 1976, he signed a statement made out by an employee of the appellant's solicitor admitting that the heroin belonged to him and that the evidence given in court was untrue.

At the appellant's request we agreed to receive for consideration in this appeal an affidavit to which these statements were annexed. We also agreed to a submission on behalf of the respondent that we should accept in evidence three affidavits: one made by Cox sworn the 8th March 1977, an affidavit by Bruce Alan Scott sworn the 9th March 1977, and

an affidavit by Lauren Angus Savkovs sworn the 9th March 1977.

In his affidavit Cox denied the truth of the statements made on 20th December 1976, stating that these had resulted from pressure applied to him by two men unknown to him who visited him while he was in hospital and threatened him and his parents with physical violence unless he retracted his evidence as given in court and "take the blame off Peter Davies." The affidavit of Savkovs and Scott were filed to support Cox's statement that he had a visit from two men as claimed by him.

It is now important, I think, to turn to the reasons for the Magistrate's decision to convict the appellant. He elected to accept Cox's evidence that the heroin belonged to Davies. He did so in these terms:

"Without a doubt Cox's evidence must be treated with great care. He gave me the impression he was a weak inept man of no great moral virtue but I found that in parts of his evidence material to the complainant's case he was persuasive and I believe him. In particular I accept his evidence relating to the handling of the heroin at 20 Dupont Street and to the taking of small quantities by him from each of the bags in the cannister and the reason for taking it to the beach and burying it. If the heroin had been his why take the course he did? Davies was charged on the 18th of August and Cox was charged with the same offence a couple of days later. A fingerprint of Cox had been found on one of the bags containing the heroin and apparently that evidence resulted in the charge being laid. It is surprising more fingerprints at least of Cox were not found. Davies and Cox next met in the remand section of Fremantle gaol. As to the evidence relating to the conversation between them I found the version offered by Cox the more credible. Davies when told that the fingerprint had been identified no doubt felt that Cox would be convicted and it would not be any added burden for him to assume sole responsibility for the heroin."

The acceptance of Cox's evidence as to the ownership of the heroin would, in view of the quantity, be sufficient to warrant a conviction. However His Worship went on to accept the evidence of the detectives that Davies had admitted to them that the heroin belonged to him. He did so in these terms.

"In this jurisdiction the most troublesome area of evidence is that involving the verbal confession.

Perhaps a case could be made out for the amendment of the rules of evidence to exclude verbal confessions unless made in Court. As the law stands of course such confessions are admissible if freely made. Detective Mitchell in my view accurately recounted the events in the course of which Davies, I find, admitted the heroin was his. Detective Wojtasiak's manner in the witness box in contrast to that of Mitchell left something to be desired. I could see no point in his sparring with counsel over the meaning of slang terms common to people he must cross paths with in his day to day work. However, I am satisfied his evidence of Davies' confession was factual.

It was pressed on us by the appellant's counsel that His Worship, had he disbelieved Cox, would not in probability have convicted the appellant because he would have been reluctant to accept the evidence of the detectives contested as it was by the appellant. A lot was made out of the first three sentences of the above quote but in my view His Worship was merely speaking generally and there is nothing in those sentences which casts any doubt on the specific finding the Magistrate made that the evidence of the appellant's confession was true.

In certain other areas of the evidence His Worship disbelieved the appellant. For example, he preferred Cox's version of what happened on 9th November on the eve of the commencement of the hearing. In short, he concluded that the appellant and Trenchard had gone to see Cox to induce him by threats not to give evidence the next day which would incriminate the appellant. He also disbelieved the appellant in his allegation that he was assaulted, threatened and humiliated by

police officers. Even though, therefore, his Worship had some reservations about Detective Wojtasiak's manner in the witness box, he nevertheless concluded that his evidence of the appellant's confession was true.

It therefore seems to me that even if it can be made out that a mistake of fact or law has been made by His Worship in accepting the evidence of Cox, in the light of conflicting statements made by him on 20th December 1976, His Worship's decision is abundantly supported by his finding in relation to confessions made by the appellant of ownership to the two detectives. Those confessions with the other evidence in the case are sufficient to warrant the conviction, and the appeal should therefore be dismissed for this reason alone. However, I propose to deal with other matters raised by the appellant.

Even assuming for the moment that the two statements of 20th December 1976, made by Cox are relevant, credible and of sufficient cogency to meet the requirements laid down in respect of fresh evidence in the case of Ratten v. R., 4 A.L.R. 93, it would seem on the authorities that the order nisi for that reason should not be made absolute. It is clear enough that the fact that a witness called for the prosecution on a criminal trial after declares that his evidence against the prisoner was false is not in itself a sufficient ground for ordering a new trial, (see Davies v. R., 57 C.L.R. 170). But if the verdict is open to objection upon a ground affected by such evidence, the case is different, (Davies' case, p. 184). In Davies' case it was held that evidence similar to the type of evidence I am now considering was relevant and ought to result in a new trial because the testimony, which was later said to be false, had been used to support evidence of identity otherwise open to objection. In this particular case there is no objection to the conviction (that is, an objection perservered with at the hearing) otherwise than that the Magistrate's acceptance of Cox's evidence can now ^{be} seen to be in error by reason of the statement of the 20th December 1976. In my view, therefore, this is an additional

reason why this appeal must fail.

What the appellant has to sustain in his particular case is that there has been an error or mistake in law or fact on the part of the Magistrate (see s. 197, Justices Act, 1902-1976). It does not matter for the purposes of this case whether the appellant's contentions amount to establishing an error of fact or law for in my view nothing has been advanced by the statements of 20th December 1976, which amount to demonstrating that on the material before him his Worship made a mistake of fact or law in accepting Cox's evidence. His Worship was fully aware of the fact that Cox was a vacillating person who had made conflicting statements. He obviously came to the conclusion after careful consideration that notwithstanding his conduct in this regard he was a witness of truth so far as his sworn testimony was concerned. All that the events subsequent to the hearing demonstrate, is a continuance of the pattern; that is, statements made alleged to be due to pressure accepting ownership, and when the pressure is taken off, relieved or seen to be at a distance, a statement that the appellant was the owner of the heroin.

In this appeal I am not to be taken as deciding or accepting that s.205 of the Justices Act authorises this Court on the return of an order nisi to review to receive "fresh evidence." I adopt the words and the position of Burt J. (as he then was) in Chen Yin Ten v. Little, 11 A.L.R. 353, at p. 361. I would add that the decision of Hale J. in Di Camillo v. Wilcox, 1964 W.A.R. 44, seems to direct this Court's attention to the material which was before the Magistrate to decide whether he has made an error or mistake in law or fact.

Finally, even if I had been able to find in favour of the appellant on all the above matters, I would still be against making the order nisi absolute for in my opinion the evidence said to be fresh does not meet the requirements as laid down by Barwick C.J. in Ratten's case at pp. 100-101. In this particular case the appellant is saying in effect that by reason of the subsequent retractions of the truth of the evidence, the

conviction should be quashed and the matter should be remitted to the Magistrate (or ? another Magistrate) for a new trial. Consequently, as I apprehend the test in relation to fresh evidence (assuming that this evidence could be designated "fresh") I have to decide on the relevancy, credibility and cogency of it in order to determine whether the evidence if accepted with the other evidence received at the trial, it is likely a verdict of guilty would not have been reached. As I understand it, in considering the material for this purpose the element of credibility will be satisfied if I am of the opinion that the evidence is capable of belief and likely to be believed. There are a number of reasons why I think the evidence is not likely to be believed by His Worship. They are these. In a matter where the critical question is whether a person owns a particular thing, the most relevant material, it seems to me, upon which to judge the truth of the assertion of ownership is the answer to these questions: where and from whom were the goods obtained? how much was paid for them? and how did the alleged owner finance the purchase? In this particular case the evidence shows that the heroin, is worth about \$80,000. In not one of the written statements made by Cox either before or after his oral evidence is any light shed on the answer to any of these questions. It must also be remembered that in these statements Cox was asserting that not only did he own the heroin, but he had obtained it for his use, that is, as I understand it, for his own consumption. Not unexpectedly Mr. Kakulas in his evidence expressed surprise that Cox had said the heroin was for his own use when it was valued at \$80,000. Though in cross-examination Cox was questioned on his means to demonstrate that he was part of the "drug scene", the answers seem to me to illustrate his financial inability to purchase the drug in such quantity for his own use. We are therefore left with the bald assertion in the statements by Cox that the goods belonged to him and were purchased for his own use without any material which lends credibility to that statement. In my view it is not surprising that His Worship preferred to accept the contrary

version of the ownership from the mouth of Cox in the witness box and I am of the view that the "fresh" evidence is not credible and therefore ought not to warrant the conviction being quashed and a new trial ordered.