cation had acted outside the powers given him by s. 106a. Mayo A.C.J. and Abbott J. took the view that under s. 106a, if and when the defendant chooses to plead guilty, the court becomes a court of summary jurisdiction for the purpose of the charge, but, . . . only to deal with the matter on the plea of guilty, and that if and when the defendant intimates that he pleads guilty a duty is immediately cast upon the Magistrate to decide whether or not the time for "taking" the plea of guilty should be postponed. "Before anything else is done in continuation of the proceedings, the Magistrate must address his mind to the question (i.e. of taking the plea) and adopt an opinion based on the subject matter that has been brought to his notice."

If the Magistrate decides that the time for the taking of the plea of guilty ought to be postponed, then it is ordered that the plea be withdrawn under s. 106a (3) (a). If the Magistrate continues the proceedings in any way, either by expressly "taking" the plea of guilty or by impliedly doing so (for example, by entering a conviction and remanding the defendant for sentence), then the inference is that he has considered the matter and decided that the time for "taking" the plea need not be postponed.

The adjournment by the Magistrate was obviously not for the purpose of considering the postponement of "taking" the plea, but rather for the convenience of the *convicted* defendant; the information had been endorsed "Convicted" at the time that the plea was taken. The third Judge (Reed J.) suggested that if an order to withdraw the plea is not made because the Magistrate improperly failed to exercise his discretion to do so then there may be a remedy. But there was no proper ground in the present case to suggest that the Magistrate should have made such an order.

POLICE OFFENCES ACT, 1953-1957, s. 41

Elements of Offence of Unlawful Possession.

Wallace v. *Hansberry*[1] raises two interesting problems: what are the elements of the offence of unlawful possession of personal property constituted in s. 41 of the *Police Offences Act* 1953-1957; and how far may a Magistrate or a Judge take the conduct of a trial into his own hands in the interests of justice.

S. 41 provides:

> "(1) Any person who has in his possession any personal property which either at the time of such possession, or at any subsequent time before the making of the complaint under this section in respect of such possession, is reasonably suspected of having been stolen or unlawfully obtained shall be guilty of an offence."

The section supersedes s. 93 of the *Police Act* 1936 and provides a complete departure from it. It is simpler in content and was clearly designed to render the body of case law surrounding the older section no longer applicable.

---

1. [1959] S.A.S.R. 20.

Ross J. found that under s. 41 the elements of the offence to be proved beyond reasonable doubt by the prosecution are:—(1) possession by the accused of personal property; (2) a suspicion entertained (either at the time of possession or at any subsequent time prior to the making of the complaint) that the goods have been stolen, or unlawfully obtained; (3) upon reasonable grounds. He continued: "The prosecution are not required to establish *mens rea* on the part of the defendant and if it proves the three elements above mentioned the defendant is liable to be convicted unless he can take advantage of the defence given him by sub-section (2) by proving that he obtained possession of the property honestly."

The learned judge's view that *mens rea* is not a constituent part of the offence must be compared with the decision of Ligertwood J. in *Palumbo* v. *O'Sullivan*.[2] In that case the precise definition of "possession" was raised because the defendant was charged with the unlawful possession of a wristlet watch found in his coat pocket, and he claimed that he had no knowledge of its presence there. The learned judge found that "the onus was on the prosecution to prove beyond reasonable doubt that the appellant knew that he had got the watch . . . either because such knowledge was a necessary element in the proof of possession or because such knowledge was a necessary element in the proof of *mens rea*".[3]

On the question of knowledge of possession he said: "in an enactment which makes possession itself a crime, one would expect that there ought to be a mental element in the conception of possession, and that a person should not in general be declared to be a criminal with respect to a chattel, if he does not know that he has got it." On the question of *mens rea* he said: "Some element of guilt in the accused must ordinarily be shown, and if a person is charged with unlawful possession of a chattel then in most cases he can hardly be said to be guilty if he does not know that he has got it. It is submitted that the requirement of knowledge for possession is in effect much the same thing as *mens rea* in a charge of unlawful possession. Possession is the only element of the offence in which the accused's state of mind can be relevant, and if it is to be taken into account it may be equally well described as 'knowing' or as 'being of a guilty mind'." It would seem then that the views of Ligertwood J. and Ross J. on the necessity of proving *mens rea* are opposed. But it should be remembered that *Wallace* v. *Hansberry* was not a case where the question of possession was in issue. Moreover, Ross J. speaks of the proof of *mens rea* as it might arise outside proof of the three elements of the offence. If the situation in Palumbo's Case were to arise again it is submitted that it would be open to the Court to regard Ross J.'s dictum as not excluding the necessity of showing that the accused knew that he was in possession of the property.

Ross J. was primarily concerned with the question whether there was proved a suspicion that the goods were stolen or unlawfully obtained held by some other person (in this case the arresting officer) on reasonable grounds. It was argued that as the officer had not sworn that he had entertained a suspicion, it was not proved beyond reason-

2. [1955] S.A.S.R. 315.
3. Id. at 321.

able doubt. His Honour followed *Poidevin* v. *Hudson*[4] (a case dealing with s. 93 (1) of the *Police Act* 1936) and held that such suspicion need not be expressly deposed to if there is sufficient other evidence. On the question of reasonableness he adopted the test propounded by Napier C.J. in *Dent* v. *Hann*[5] (also a s. 93 (1) case): "The facts which bring the section into play and call upon the defendant for his explanation should be clearly disclosed to the Court, so that the Court can say whether the suspicion was one which it was reasonable to entertain in the circumstances." The test is thus an objective one and although the Court will pay considerable attention to any grounds of suspicion stated by the suspector it is not bound by them and must consider them in the light of all circumstances known to the witness at the relevant time. The learned judge's discussion of these two questions show that the case law relating to the predecessors of s. 41 of the *Police Offences Act* 1953-1957 will be considered highly relevant to its construction. Indeed, as Ross J. points out, s. 41 embodies the elements of the interpretation of s. 93 (1) contained in *Moore* v. *Allchurch*[6] and approved by the High Court in *O'Sullivan* v. *Reedy*.[7]

The other major ground of appeal concerned the extent to which a trial judge or magistrate may interfere with the conduct and course of trial. The defendant had been charged with unlawful possession of two bags of onions and potatoes. At the close of the case for the defence the Magistrate, having examined the contents of the bags, recalled the defendant and questioned him first concerning the facts that the bag of onions contained in addition six carrots and a large swede and that its weight was considerably greater than twelve pounds, the weight of onions which the defendant claimed he had lawfully purchased at a market; and secondly, with respect to evidence given about the bag by witnesses for the defence. He then ordered the bag to be weighed. The magistrate explained in his judgment that he had taken these unusual steps as being "necessary in the interests of justice and for the purpose of ascertaining the truth". Ross J. considered that he was entitled to examine the contents of the bag, to have it weighed and to draw attention to discrepancies, but that he should not have recalled the defendant and examined him concerning statements made in evidence by the defendant's witnesses. However he found that no miscarriage of justice had resulted and refused to quash the conviction. His Honour accepted the principle recently restated by the Court of Appeal in *Jones* v. *National Coal Board*[8] that while the object of the judge is to find out the truth and to do justice according to law, he should not himself conduct the examination of witnesses because "he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict".[9] This aspect of the decision does not therefore break new ground; but it provides an example of where the line is to be drawn between proper and improper interference by the court with the course of trial.

4. [1935] S.A.S.R. 223.
5. (1949) A.L.R. 271 at 272.
6. [1924] S.A.S.R. 111.
7. (1953) 87 C.L.R. 291.
8. [1957] 2 Q.B. 55 at p. 63.
9. *Yuill* v. *Yuill* [1945] P. 15 per Lord Greene.