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SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v KOENE

Lush, Murphy and Fullagar JJ

20 July 1981 — [1982] VicRp 92; [1982] VR 916; (1981) 5 A Crim R 181

CRIMINAL LAW – HANDLING STOLEN GOODS – COUNTS OF THEFT AND RECEIVING LAID IN THE ALTERNATIVE – WHETHER THE SECTION PRODUCES THE RESULT THAT CROWN MUST PROVE THEFT BEYOND REASONABLE DOUBT ON FIRST COUNT AND TO DISPROVE BEYOND REASONABLE DOUBT ON THE SECOND: *CRIMES ACT* S88.

The words "otherwise than in the course of the stealing" in s88 of the *Crimes Act* 1958 provide a defence to a charge laid under the section.

LUSH J: The evidence in the case may be summarised in this way: on 4th December 1980, a motor car, the subject of the first count, was left parked, the keys in it, at about 10:30 p.m. On the return of the driver in charge of it the car had disappeared. It was subsequently found at some time between 2.45 and 3 o'clock in circumstances in which the jury appear to have found that the applicant was in possession of it. Except that the possession of the car was related to the possession of the goods, we are not concerned with the offence relating to the motor car. Between 2.30 and 2.45 on the same day, two residents of the area where Jensen Road runs into the forms a T-intersection with Kathleen Street saw three men and the stolen car at two different times about five minutes apart. They saw the men remove a large television set from one house and a small television set from another, and put them in the boot. The men then left in the car. One of the residents telephoned the police on two occasions, once after his first and once after his second observation of the car and the men.

At a time between 2.45 and 3 o'clock the car was sighted from a police helicopter at a point about three miles from the houses from which the television sets had been taken. A police car was directed to the vicinity and evidence was given by the officer who arrived in that car that the applicant, who had been observed from the helicopter at the car itself, was walking away from the car and threw away the keys which turned out to be the keys of the car. He was arrested but at least for a substantial time he declined to make any statement about what he was doing, beyond denying or implying a denial that he had any connection with the car. Mr Tovey referred to some English cases on the inconsistency of verdicts in similar circumstances. I do not find it necessary to review these cases because, as will appear in due course, my view is that the facts of the present case exclude the argument that the verdict of guilty on the receiving charges was inconsistent with the acquittals on the burglary charges.

The English cases – and it may be convenient to name those cited – are these: *R v Loughlin* (1951) 35 Cr App R 69; *R v Christ* (1951) 35 Cr App R 76; *R v Seymour* [1954] 1 All ER 1006; (1954) 38 Cr App R 68; [1954] 1 WLR 678; *R v Melvin and Eden* [1953] 1 QB 481; [1953] 1 All ER 294; (1953) 37 Cr App R 1. These cases deal with the various problems of equivocal evidence. *Melvin and Eden* deals with a situation in which the trial had been conducted on the basis that the effective charge was theft, and no direction had been given on receiving, although the facts of the case raised a difficult question of possession which called for a direction if the jury were to consider the receiving charge. The accused men having been acquitted of theft but convicted of receiving, the receiving convictions were quashed.

The most significant part of the argument strongly presented by Mr Tovey was related to the ground which he sought to add by way of amendment that it was an essential of the proof of the offence of handling stolen goods that it should be established beyond reasonable doubt that the goods were handled otherwise than in the course of the stealing (*Crimes Act* 1958 s88(1)). He contended that there was nothing in the case to indicate that the jury was so satisfied and nothing in the charge had informed the jury that they were required to be so satisfied. In fact, in

stating the definition of the offence of receiving the learned Judge omitted the words, "otherwise than in the course of the stealing".

It may be convenient to refer to two authorities dealing with the law of receiving generally before turning to the points specifically made under s88. In the fourth edition of *Halsbury*, Vol, 11, paragraph 1291 the following appears:

> "The possession by a person of goods which have been recently stolen is some evidence, in the absence of a reasonable explanation by him as to how they came into his possession, that he either stole them or received them knowing them to be stolen depending on the particular circumstances. The weight attributable to the evidence depends on the nature of the goods and the length of time which has elapsed from the time when they were stolen to the time when they are proved to have been in the possession of the defendant. If a person is accused of receiving stolen goods and recent possession of them by him is established, he may be convicted of handling stolen goods in the absence of any explanation by him of the way in which they came into his possession which might reasonably be true, and which is consistent with innocence; but if he gives such an explanation, even though the jury is not convinced of its truth, the defendant is entitled to be acquitted in the absence of other evidence, because the prosecution has failed to discharge the duty of satisfying the jury that it is sure of the guilt of the defendant; the onus remains on the prosecution."

The first sentence in that passage includes a footnote reference to *R v Langmead* [1864] EngR 47; 169 ER 1459; [1864] Le & Ca 427; (1864) 9 Cox CC 464; 28 JP 343. At p439 (ER p1463) of that report Pollock CB said:

> "If no other person is involved in the transaction forming the subject of the enquiry, and the whole of the case against the prisoner is that he was found in the possession of the stolen property, the evidence would, no doubt, point to a case of stealing rather than a case of receiving; but in every case, except, indeed, where the possession is so recent that it is impossible for anyone else to have committed the theft, it becomes a mere question for the jury whether the person found in possession of the stolen property stole it himself or received it from someone also. If, as I have said, there is no other evidence, the jury will probably consider with reason that the prisoner stole the property; but, if there is other evidence which is consistent either with his having stolen the property, or with his having received it from someone else, it will be for the jury to say which appears to them to be the more probable solution. In this case, although there is some evidence that the prisoner stole the sheep, yet the inference that he sent his boys to drive the sheep and to receive them from someone who had stolen them in connection with him appears to me the more cogent. However this may have been, we are all of opinion that there was evidence to go to the jury."

Turning to s88, it was contended on the authority of statements from *Stapylton v O'Callaghan* (1973) 2 All ER 782 that the Crown had to prove under s88 that the receiving was otherwise than in the course of the stealing: what was required was proof beyond reasonable doubt and that this requirement was not satisfied by the verdict of not guilty of burglary which implied no more than a doubt whether the applicant had stolen the goods and did not amount to a finding that the jury was satisfied beyond reasonable doubt that he had not. In parenthesis I mention that there was no count of theft in the presentment but in this particular case that is of no significance because on the evidence the applicant must have been held guilty or not guilty of theft according as he was guilty or not guilty of burglary.

In my opinion the words "otherwise than in the course of the stealing" provide a defence to a charge laid under the section. It may well be, but I do not decide, that the Crown carries the onus of displacing this defence. It is not, however, necessary for the trial judge to direct the jury on the issue unless the evidence in the case raises the question on which the issue turns.

This was clearly the view of Glanville Williams, expressed in his *Textbook on Criminal Law* at p827. It is based on the decision of the Court of Appeal in *R v Griffiths* (1974) 60 Cr App R p14. In that case the accused man appears to have been charged with receiving only. As here, the learned judge had not referred to the words in question but the Court held there was nothing in the evidence to indicate that the accused man was the thief. There was, therefore, nothing on which the defence could be based. There was evidence of possession of the stolen goods in that case but the interval between the theft and the arrest was four days and the possession was in a different town from that where the theft had occurred. At p16 James LJ said:

> "The Recorder directed the jury in terms which made no reference to 'otherwise than in the course

> of the stealing' in relation to the ingredients of the offence charged. He did not give the direction which Mr Keane has argued would have been given. In the judgment of this Court the Recorder was absolutely right to deal with this aspect of the case as he did. There was no issue as to whether the receipt of the candlesticks was otherwise than in the course of the stealing. In a case in which there is, on the evidence, an issue as to whether the receipt of stolen goods was in the course of the stealing or otherwise a direction would be necessary. To give such a direction in this case, in which there was no issue to which counsel's submission could relate, would have been both confusing and wrong."

In the present case the evidence of possession was of possession very close in time to the theft and was evidence against the applicant of theft. The jury, however, rejected the theft charge, no doubt because the evidence of the neighbour witnesses at least threw doubts on the inference of theft available from the evidence of recent possession. The applicant himself at all stages of the trial denied implication in the theft. In these circumstances it cannot be said that the defence that the goods were received in the course of the stealing was in the end a relevant issue on the charge of receiving.
