Hon m Justice G. Horre R

IN THE CAYMAN ISLANDS COURT OF APPEAL

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

C.I.C.A. APPEAL NO. 3 OF 1990

BEFORE: THE HONOURABLE MR. JUSTICE ZACCA, O.J. PRESIDENT
THE RT. HONOURABLE MR. JUSTICE TELFORD GEORGES, P.C. J.A.
THE HONOURABLE MR. JUSTICE JAMES S. KERR, J.A. Q.C.

BETWEEN: LESLIE RICHARD STEWART

AND: REGINA

NOVEMBER 26TH & DECEMBER 6TH, 1990

The facts of this case though simple required careful analysis. The appellant pleaded not guilty to an indictment containing two counts - theft, contrary to section 212 and 218 of the Penal Code and handling contrary to section 231 of the Penal Code. The article allegedly stolen or handled was a cash register containing Cayman and United States currency and a quantity of jewelry of unknown value the property of Mr. James Wood.

Mr. James Wood is the owner of a bar. The cash register was used in connection with that business. The case for the Crown was that on the night of June 15, 1989 the appellant had been hanging about the bar at about 1:00 a.m. at closing time. The evidence of Mr. Wood could support a finding that he may have locked the door of the bar while the appellant was inside or that he may have closed the door but failed to lock it while the appellant was still in the vicinity. Next day it was noted that the cash register was missing. A report was made to the police.

Investigations were launched. At about 10:40 p.m. on that very day Sgt. Bodden searched a room occupied by the appellant in his brother's house. Under the bed was found a cash register later identified as that missing from Mr. Wood's bar. The appellant himself could not be found.

The cash register was taken to the police station. Coins and various articles of jewelry were recovered from the

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drawer section. Mr. Wood identified the jewelry as his. The appellant was eventually arrested on June 30, 1989.

The appellant gave evidence on his own behalf. He testified that he had found the cash register in a garbage dump near Mr. Wood's bar. He had gone to the dump to find a cardboard box to use as a sort of cushion to protect his pants as he sat on a wall. As he pulled the cardboard box the register rolled over. He heard a jingle in it so he picked ut up and took it to his room. There he used a screw driver to wrench a drawer in which he found $3.80 which he kept. Thereafter he had placed the cash register under the bed. He explained that at the time he knew that there was a warrant out for his arrest for non-payment of a fine and for that reason he had been keeping a low profile. Between the date of his arrest and the date he had put the cash register under the bed he had returned to his room and had noted that it was missing but he had made no inquiries as to who may have removed it.

On those facts Mr. Sheehan who appeared for the Crown at the trial urged the jury to disregard the count of receiving, his argument being that the appellant's account was obviously nonsense and not believable. Notwithstanding, the jury acquitted the appellant of theft and convicted him on the count of handling.

In his summing up the trial judge dealt with the count of handling thus -

> "Put it at its simplest, handling by receiving which is the particular form of handling which we are concerned with today is committed by a person dishonestly taking possession of stolen goods knowing or believing them to be stolen goods. Of course a thief in a sense - a thief, he receives in a sense the goods by the act of stealing but for that reason the law says that receiving must be otherwise than in the course of stealing. The goods in other words must be stolen goods before the act of handling. Now I am going to give you a direction on this, if it should come to it. It is this. You can convict of handling if you are satisfied that the accused dishonestly came into possession of property stolen by another person - and the accused would have come into possession or control of the cash register when he picked it up and the contents of the cash register at the moment he opened it and gained access to the contents."

This direction was erroneous. If the appellant's story was to be believed it would establish that he had picked up the cash register believing that it had been discarded by being thrown on the dump. Its owner had, in effect, abandoned possession. On that state of facts no issue of handling would arise. The appellant would not have received the goods from any one. The issue then would have been whether the Crown had established beyond a reasonable doubt that the appellant could not have genuinely believed that the cash register bad been abandoned. In that case he could have been convicted of its theft.

A count of handling could arise only in circumstances in which the jury disbelieved the appellant's story that he had found the cash register on the dump and was also not satisfied that he had stolen it from the bar as the Crown alleged. If on that basis they were nonetheless satisfied that the cash register had been stolen and that the appellant, knowing that it had been stolen, had received it from the thief in circumstances which remained unrevealed, then a conviction of handling could be sustained. That was not however, the Crown's case and on the facts adduced would be sheer speculation.

The conviction on the count of handling was based on a misdirection and should be quashed.

On any view that was a case in which there should only have been a single count - one of theft. The property allegedly stolen was a cash register - property of a type which does not easily pass from hand to hand. It had been stolen some time after 1:00 a.m. on June 15, 1989 and recovered from under the appellant's bed at 10:40 p.m. Possession of such recently stolen property would have abundantly justified the inference that the appellant was the thief. It is not within the power of the Court, however, to substitute a verdict of guilty of stealing because the appellant has been acquitted on that count. We would draw attention to the guidance given by Lord Godard C. J. in R. v. Seymour (1954) 1 ALL ENGLAND REPORT 1006 at page 1007 as to how such cases should be dealt with:

> "The Court desires to lay this down. In cases where the evidence is as consistent with larceny as with receiving, the indictment ought to contain a count for larceny and a count for receiving. The jury should then be directed that it is for them to come to the conclusion whether the prisoner was the thief or whether he received the property from the thief, and should be reminded that a man cannot receive from himself. Then to prevent other difficulties which have sometimes arisen, if the jury come to the conclusion that it is a case of receiving, they should be discharged from giving a verdict on the larceny count. Equally, if they come to the conclusion that it is larceny, they should be discharged from giving a verdict on the receiving count."

In this case the judge directed the jury to convict the appellant on the receiving count only if they found him not guilty of the count of theft. Had he adopted the procedure outlined by Lord Goddard C. J. it would have been open to this Court to substitute a conviction on the count of theft. The acquittal precludes this.