JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 119/79 & 120/79.

BEFORE: THE HON. MR. JUSTICE LEACROFT ROBINSON - PRESIDENT
THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE ROWE, J.A.

R. v. RENNIE SMITH

AND

R. v. ROY McCARTHY

Mr. H. Harris for the appellants.

Miss D. Wilson for the Crown.

March 26, May 14, 1980.

KERR, J.A.:

These were applications for leave to appeal against convictions and sentences in the Home Circuit Court on June 27, 1979, before Malcolm J. and a jury. In the end, the application of Smith against conviction was refused while that of McCarthy was treated as the hearing of the appeal, the appeal was allowed and the conviction quashed. We now set out our reasons for so doing.

The applicants were originally charged on an indictment containing 4 counts: Counts 1 and 3 for Larceny of mail bags and postal articles respectively and counts 2 and 4 for Receiving Stolen Goods contrary to Section 46(2) of the Larceny Act as alternatives to counts 1 and 3. The Jury acquitted them on counts 1 and 3 but found both guilty on counts 2 and 4.

About 5:30 a.m. December 4, 1977, there was a Police Road block on the Rockfort Main Road not far from the factory of the Cement Company. Along came a green motor pick-up which stopped ½ chain from the Road block and alighting from it was the applicant Smith. Phillip Green an Assistant Inspector of Postmen who was on

the scene gave evidence to the effect that Smith with whom he spoke told him he was going to see a friend at the Cement Company. He Green pointed out to him that he had already passed the Cement Company. Green then went to the pick-up which was being driven by the applicant McCarthy, who told him he was having engine trouble with the pick-up. To Green's enquiry McCarthy said he was carrying in the pick-up "3 bags of fowl feed". On examination Green found that the bags contained mail bags with postal articles. Leaving a soldier in charge of McCarthy, Green went after Smith, held him and brought him back to the van.

Evidence was given by Denzil Bailey, a postal officer, Caleb Prince, the postmaster of the General Post Office, Kingston and a Miss Gordon of the Old Harbour Post Office as to the system obtaining in the post offices and to the effect that the postal articles were recently in the course of transmission by post. From the fact that the bags contained both foreign and inland mail it was opined that they had not yet been sorted for their postal addresses or areas. In addition from these articles a Mr. O'Connor and Mrs. Pearson in evidence identified letters posted recently by them.

In defence Smith gave evidence to the effect that on the morning in question he was on the Rockfort Road when he saw 2 men behind a parked motor truck. As he approached they went on the truck which drove off. At the spot where the men were he saw the 3 bags which then looked to him as containing 'fowl feed'. On feeling the bags he decided to take them to the Police Station, so he stopped the pick-up, driven by McCarthy, and engaged McCarthy to so transport the bags for Six Dollars. The bags were placed in the pick-up.

In cross-examination he denied knowing McCarthy or living at 24 Hillside Crescent the address stated in his Bail Bond.

McCarthy in evidence said he lived at 14 Hillside Crescent but denied knowing Smith before that morning. He was driving his pick-up along the Rockfort Road when Smith stopped him and hired him

to convey the bags to Bull Bay. Smith had at first told him the bags contained chicken feed but later said they contained mail bags. The pick-up, he said, broke down at the Road block. He denied stealing the mail bags or that he and Smith were transporting the bags to some other place when they were held in the Road block.

For Smith, it was argued that the verdict was unreasonable having regard to the evidence and in particular that there was no evidence to support a conviction for Receiving Stolen Goods. Alternatively, that the "trial judge failed to put to the jury his case so that they could arrive at a proper verdict."

After proper general directions on the onus and standard of proof required of the Prosecution, the learned trial judge in the course of reviewing the evidence for the defence told the jury that if they believed Smith as to how he came into possession of the bags or if his account raised a reasonable doubt their duty would be to acquit him.

We found no merit in these grounds.

For McCarthy, Mr. Harris argued to the effect that having regard to the nature and conduct of the defence the jury had to decide whether McCarthy was a joint receiver of the stolen goods or whether as contended by the applicant he was merely a hired carrier with no proprietary interest in the goods and only came into the affair after the goods were in the possession of Smith and that on this latter aspect of the matter the trial judge failed to give the jury any directions.

It seems clear from the summing-up that the trial judge omitted to advert the jury's attention to this important issue and to give them specific directions as to McCarthy's position in law if they found or were in doubt as to whether or not he was merely transporting the receiver and his stolen goods for a fee of Six Dollars.

In Hobson v. Impett (1957) 41 Cr. App. R. 138 at p. 141 Lord Goddard in delivering the judgment said:-

> "It is not the law that, if a man knows goods are stolen and puts his hands on them, that in itself makes him guilty of receiving, because it does not follow that he is taking them into his control. The control may still be in the thief or the man whom he is assisting, and the alleged receiver may be only picking the goods up without taking them into his possession, the goods all the time remaining in the possession of the person whom he is helping."

In this regard the case of R. v. Healey and Owens (1965) 1 All E.R. at p. 365 is persuasively illustrative:-

> "O. was invited by H. to take part in a task of melting tin at a remote farm. The tin was stolen. O. took part in melting it. O. was subsequently convicted of receiving the stolen tin. His defence was that he was short of money, that he was enlisted to do this job of work as assistant, and that he did not know that the tin was stolen. In the summing-up the jury's attention was not drawn to the difference between a person who was merely assisting illegally and a person who, by his assistance, had become a joint possessor with the principal (in this instance, H.) whom he was assisting."

and in the judgment at p. 368:-

> "..... so far as the appellant Owens is concerned and this incident of the tin, it was, in the view of this court, essential, if the issue was properly to be laid before the jury, to direct their attention to the possibility envisaged in the cases cited that the appellant Owens was, as he said he was, merely a labouring assistant albeit tainted with guilty knowledge. He was, as already said, in a very different position from the appellant Healey, and, as it seems to this court, the learned commissioner never did draw the jury's attention to the difference between on the one hand a person who by his assistance has become a joint possessor with the principal whom he is assisting, and on the other hand a person who is merely assisting illegally."

We accept as a correct statement of the law that mere aiding and abetting in the disposal of stolen property will not make a man guilty of Receiving. R. v. Watson (1916) 12 Cr. App. R. p. 162. Accordingly where there is some question whether an accused was merely acting as a porter or carrier and without any evidence that he was going to share in the proceeds it seems prudent and desirable to include in addition to the substantive counts of Larceny and Receiving stolen goods a count for accessory after the fact to the Larceny. R. v. Brooker (1956) Crim. L.R. p. 489 because where a

person is indicted as a principal he cannot be convicted if the evidence shows he was merely an accessory after the fact: R. v. Fallon (1862) L & C 217.

On the evidence in this case had the applicant been so charged as an accessory after the fact a conviction for that offence would be unassailable. In the instant case the failure of the learned trial judge to direct the jury in the manner indicated in Hobson v. Impett and Healey & Owens supra, denied the applicant McCarthy a fair considerarion of his cardinal line of defence. In the circumstances, this was fatal to the conviction. As we were unable to say that had the jury been so directed they would have come to the same conclusion, there was no alternative but to quash the conviction and to enter as we did a judgment and verdict of acquittal.

In passing, we note that the jury were asked for their verdict on each count in turn. We desire to point out that where the counts of an indictment are true alternatives, that is mutually exclusive as Larceny and Receiving Stolen Goods, and not for example merely in descending order of gravity, the question seeking the jury's verdict ought to be put in the manner indicated and for the reasons stated in R. v. Seymour (1954) 38 Cr. App. R. 68 at p. 72:-

> "In cases where the evidence is as consistent with stealing as with receiving, the indictment ought to contain a count for stealing 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 count for stealing. Equally, if they come to the conclusion that it is a case of stealing, they should be discharged from giving a verdict on the count for receiving. Sometimes a difficulty has arisen. We have had to quash a conviction, say, for receiving and the court has come to the conclusion that the evidence showed stealing and not receiving. If a verdict has been returned on the count for stealing, this court cannot substitute for the verdict of receiving a verdict of stealing."

In respect of Smith's application for leave to appeal against sentence, we granted the application, allowed the appeal and in view of the fact that he is over 60 years of age and his last conviction was in 1965 and for the sentence of 6 years on each count substituted a sentence of two years on each count to run concurrently from the date of conviction.