59/56

G.P.-S.4706—1950-1—6,000. U.D.J. 445.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Appellate DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN KRIMINELE SAAK.

ATTORNEY-GENERAL of the TRANSVAAL
Appellant.

versus

Accused
VALLY MOHAMED ARBEE
Respondent.

Appellant's Attorney N.G. *Respondent's Attorney* Meltz.
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate N. le Roux. *Respondent's Advocate* No appearance.
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on:— Thursday 30th August 1956.
Op die rol geplaas vir verhoor op:—

1. 2. 4. 7. 11. — C.A.V.

— Appeal allowed, — the conviction of the Regt. by the Magte. is restored, also the sentence excepting that the period of 5 yrs. D.C.L. is reduced to 2 yrs. D.C.L.

J. Wessels
Regr. 10/9/56

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between :

THE ATTORNEY-GENERAL OF THE TRANSVAAL Appellant

&

VALLY MOHAMED ARBEE Respondent

CORAM : Centlivres C.J. Schreiner, Fagan, Reynolds JJ.A. et Beyers ~~Hall A.J.A.~~.

Heard : 30th August 1956. Delivered : 10.9.56

J U D G M E N T

CENTLIVRES C.J. :- The respondent was convicted by a magistrate of receiving two watches well knowing that they had been stolen. He was sentenced to five months' imprisonment with compulsory labour and in pursuance of S.329(2)(a) of Act 56 of 1955 he was also sentenced to four cuts.

There was ample evidence on the record to support the following findings of the magistrate :-

(a) The two watches had been stolen

(b) The day after they had been stolen the respondent received these watches into his possession from the thief.

(c) When first accosted by the police the respondent denied that he had in his shop any watches which did not belong to him.

(d) When the watches were found in his till the respondent

gave the explanation that a tsotsi, whose name and address were unknown to him but who was known to him by sight, had pledged them with him as security for a loan of £2. 10. Od.

(e) Later at the charge office the respondent told a detective that the pledgor's name was Johannes.

(f) At no stage did the respondent mention to the police an invoice slip which he produced at his trial. This invoice slip purported to record the making of the loan and was signed by means of a cross but was not witnessed by anyone. The thief who handed the watches to the respondent can write and he denied that he signed any paper and that his name was Johannes.

(g) The invoice slip was a false document, it having been filled in by the respondent while he was on bail in order to bolster up his case.

(h) The respondent's story of the loan was false and

(i) The respondent when he received the watches into his possession well knew them to have been stolen.

The respondent appealed to the Transvaal Provincial Division which altered the verdict to one of theft and substituted a sentence of six months' imprisonment with compulsory labour suspended for three years on condition that during that period the respondent is not found guilty of any crime involving dishonesty. The case is reported in 1956 (2) S.A. 653 sub nomine R. v Abbee. Maritz J.P. who delivered the main judgment in the Provincial Division said :-

" It might be said, if the facts alleged by the Crown were

" established, that the person who received these watches intended to traffic in watches. But the evidence shows that only two watches - portion of the stolen property - were found in the possession of the appellant. These two watches were found in the till of the appellant and exposed to the view of any person opening the till. One of these watches still had the price tag attached.

" I would hesitate to say, even if it was proved that the person in possession of these watches knew that they were stolen, that he would be guilty of receiving within the meaning of the words used in the Act, which makes it compulsory to whip a receiver of stolen property. The word "fence" is well-known and one which is used to describe a person who buys articles from a thief in order to convert them to his own use by trading in these stolen goods. Such a trade might even be confined to one isolated transaction but there should be evidence to establish that the receiver took possession of the property with the intention of trading therein for his own benefit.

" .....

A man who receives anything from a thief knowing it to have been stolen is, in a sense, a receiver. But I do not think it was ever the contemplation of the Legislature that such a broad interpretation should be placed upon the word "receiver". I am not prepared to hold that every receiver of stolen property is necessarily a receiver within the meaning of that Legislation.

" I proceed now to deal with the facts of the case. The appellant is a cafe proprietor. There is no evidence whatever that the appellant has any other business - apart from his cafe - either lawful or unlawful. His explanation is as follows : a native came to him, one of the thieves, and asked him to lend him some money as he was a customer of his ; he asked for security for the proposed loan whereupon the native

" produced the two watches and the loan was granted ; he thereupon placed the watches in his till and forgot all about them. On that evidence I would hesitate to say - in fact I say that it could never have been contemplated that he could be branded a receiver of stolen property within the meaning of the Act.

" .....

I think the facts point irresistibly to the fact that the appellant must have known and in fact did know that the property he was taking in pledge was stolen property. "

The Attorney-General, in terms of S.105(I) of Act 32 of 1944, has appealed to this Court on the following grounds :-

" (a) That the Court a quo erred in holding that the offence of receiving stolen property well knowing the same to have been stolen included in Part II of the Third Schedule to Act No. 56 of 1955 must be confined to the receiving of stolen goods by a person with knowledge that the goods have been stolen and with the intention of trading therein for his own benefit, and does not also include such receiving by a person who does so merely for his own profit or gain or who thereby dishonestly appropriates such goods by whatever means.

(b) The Court a quo erred in holding that a verdict of guilty of theft was a competent verdict on a charge of receiving stolen property well knowing the same to have been stolen. "

The second ground of appeal may be dealt with shortly. There is nothing in Act 56 of 1955 or in any other provision of our law which enables a court to bring in a verdict of guilty of

theft on a charge of receiving stolen property well knowing it to have been stolen. It was therefore not competent for the Provincial Division to alter the verdict from one of receiving to one of theft.

Coming now to the first ground of appeal it will be convenient in the first instance to deal with crimes of theft and receiving stolen property well knowing it to have been stolen. For the sake of brevity I shall refer to the latter crime as receiving. As pointed out by Watermeyer J.A. in Ex parte Minister of Justice : in re Rex v Maserow (1942 A.D. 164 at p. 169) the name or description of the offence has been taken over from English law as the name of a substantive crime and as such it has received statutory recognition. See Secs. 238, 239, 309, 310, and Schedules 1 and 3 of Act 31 of 1917 (ss. 200, 201, 276, 277 and Schedules 1 and 3 of Act 56 of 1955). But although receiving must be regarded as a substantive crime in South Africa it does not follow that a receiver may not also be a thief. It was pointed out by Watermeyer J.A.in Maserow's case supra at pp. 169 and 170 that s.238 of Act 31 of 1917 (now s. 200 of Act 55 of 1956), under which a person charged with theft may be found guilty of receiving, "suggests that receiving is a crime which is ~~xxxxx~~ "essentially different from the crime of theft. If the word

"'theft' be used in its popular sense to denote the taking and "carrying away of another's property, then there is a real "distinction between the two crimes ; but if the word 'theft' "be used in its proper legal sense, viz: a dishonest appropriat-"ion (fraudulosa contrectatio) of another's property, then re-"ceiving is merely a particular form of theft. "

Continuing on p. 170 the learned judge refers to a receiver "in what I may call the proper sense, viz: one who "acquires the stolen property from the thief not for the purpose "of assisting the thief but for his own profit and gain." And on p. 173 the learned judge states that "a receiver in what I "have called the proper sense of the word..... is guilty "of a fraudulosa contrectatio and has therefore committed theft." Presumably the accused in Maserow's case could have been charged with and convicted of theft. This court held that he was correctly charged with receiving. It is true that in that case the main point with which the Court was concerned was whether the accused could be convicted of receiving where the stolen property had been recovered by the police and delivered by them to the thief for the purpose of trapping the accused but in coming to its conclusion the Court found it necessary to determine the essential elements of theft and receiving and to state the law

in the manner set out above.

This Court in R. v von Elling (1945 A.D. 234) endorsed the principles enunciated in Maserow's case (supra) subject to a slight modification (see p. 239) which does not affect the issue in the present case. At pp. 250-251 Tindall J.A. said that von Elling who had been charged with theft could on the proved facts have been found guilty of either theft or receiving. There is no suggestion in the judgments delivered in that case that because von Elling, who was proved to have received a motor car after it had been stolen, had committed theft he could not be found guilty of receiving.

In the past theft was regarded as a more serious crime than receiving. Theft was punished by death but receivers were not so punished excepting under Placaats of 1595 and 1614 - in the case of a second offence of receiving. In the case of a first offence what was then considered to be a ~~REMAR~~ comparatively mild punishment was inflicted viz: flogging, branding and banishment. See Maserow's case (supra at pp. 171-172). It would seem to have been this view of the comparative seriousness of the two offences that made the legislature, in sec. 238 of Act 31 of 1917, allow a conviction for receiving on a charge of theft but not vice versa. But as from May 13th, 1955, when Act 29 of 1955 came into operation, the legislature, while somewhat inconsistently retaining the basic provision of sec. 238 in the section now numbered 200, seems to regard receiving as a more serious crime than theft, for in terms of S. 62 of that Act read with S.338(2) bis(a) of Act 31 of 1917, a sentence of whipping is compulsory in the case of receivers but not of thieves other than thieves of motor vehicles or goods from a

properly locked motor vehicle. The relevant item in Part II of the third schedule to Act 56 of 1955 reads as follows :-

" Receiving stolen property well knowing the same to have been stolen (except in the case of a conviction in terms of section two hundred and five on evidence establishing that the accused is in fact guilty of the theft of property not being a motor vehicle or property stolen from a motor vehicle or part thereof which was properly locked.)"

The above provision occasions me some difficulty. Sec.205(1) is as follows :-

" If, on the trial of a person charged with an offence, it is proved that he is guilty of another offence of such a nature that, on a charge alleging that he committed that other offence, he might have been convicted of the offence with which he is actually charged, he may be convicted of the offence with which he is so charged. "

Sec. 205(1) clearly comes into operation when a person is charged, for instance, with culpable homicide and it is proved that he committed murder. He can nevertheless be convicted of culpable homicide because if he had been charged with murder a verdict of culpable homicide would have been competent under Sec. 196. But is there any room for the application of the sedtion when the accused is charged with receiving ? If the

facts show that the accused committed theft and that he had not received the stolen goods knowing them to have been stolen can he be convicted of receiving ? For the purpose of ~~the~~ section 205 we must assume that the accused had been charged with theft : if he had been so charged he might have been found guilty of receiving interms of S. 200 if "it is proved that the accused received the "stolen goods knowing them to have been stolen." Such proof is, therefore, always necessary and if such proof is given then there is no need to invoke ~~the~~ section 205. So if an accused is charged with receiving and the facts proved show that he stole but there is no proof that he received he cannot be convicted under s. ~~200~~ 205 of receiving. A contrary view to the one I hold was taken by the majority of this Court in R. v Bhardu (1945 A.D. 813). The view taken in that case was unanimously stated by this Court to be incorrect in R. v Naidoo(1949 (4) S.A. 858 at p. 867). It may be that the Legislature in enacting the item in Part II of the third schedule to the Act to which I have referred above overlooked the decision of this Court in R. v Naidoo,for the language used in that item suggests that the Legislature intended that when an accused is charged with receiving and the evidence shows that he committed theft he can under s.205 be found guilty of receiving, even if there was no evidence of receiving. To attribute a different intention to the Legislature would lead to an absurd result in a

case where an accused instigates another person to steal who then steals goods and hands them over to the accused. For in such a case, although the receiver who is also a thief has committed an aggravated offence, he would escape whipping. It is, however, not necessary to decide in the present case whether the construction placed by this Court in R. v Naidoo on the old section 243 (now the new section 205) should be revised.

It is perhaps not out of place to point out that a hard and fast rule that all persons convicted of receiving should be punished with whipping may be not in the best interests of the administration of justice. There are many cases where there is a reasonable doubt whether an accused has committed the major crime of theft and the court convicts him of the minor crime of receiving. The effect of the law as it now stands leads to the Gilbertian result that it is more to the interest of the accused to be convicted of the major crime. The requirement that whipping must be inflicted in receiving cases has led the courts in many cases to adopt the device of tempering the severity of the law by suspending the whipping. In other cases again the letter of the law has been satisfied by imposing a sentence of one cut with the cane. It would

be more in accordance with the dignity of the administration of justice to leave the punishment of receivers in the hands of the courts which have always recognised that receiving is a serious crime meriting in appropriate cases severe punishment and that if there were no receivers there would be fewer thefts.

In view of what I have said it is not surprising that the making of whipping compulsory in receiving cases has led to strange results not only in the present case but also in the case of R. v Karolia (T.P.D. July 7th, 1956). In the present case Maritz J.P., affected no doubt by the severity of the requirement that whipping is compulspry in receiving cases, sought to mitigate that severity by placing a narrow construction on the word receiving. This attempt to mitigate the severity of the law reminds one of the findings of English juries in the olden days when, for the purpose of relieving an accused of the death penalty, they found that stolen goods were of less value than they actually were. The learned Judge-President somewhat categorically said that he was not prepared to hold that every receiver of stolen property is necessarily a receiver within the meaning of the Act. The word "receive" is not defined in the Act and, this being so, one must give that word its ordinary meaning. There is no reason why a narrow meaning should be given to that

word in Act 31 of 1917 as originally enacted and it would be absurd to hold that when the Legislature in Act 29 if 1955 made whipping compulsory in receiving cases it intended by some subtle process to alter the meaning of "receive" in Act 31 of 1917. As the long title of Act 56 of 1955 indicates it was not the intention of Parliament to amend the laws relating to procedure and evidence in criminal cases : its only intention was to consolidate those laws. Consequently there is no reason why the word "receive" should not bear in Act 56 of 1955 the meaning it bore in Act 31 of 1917.

It is clear that the learned Judge-President differed from the magistrate who rejected the respondent's evidence for he said : "There is nothing on the record as it stands to "force one to reject the explanation given by the appellant "regardihg those watches." I find myself in profound disagreement with the learned Judge-President because in my view there was ample matter on the record to show that the respondent's story of the loan was false. But this is an appeal under S. 105(1) of Act 32 of 1944 which enables the Attorney-General to appeal from a decision "in favour of the accused on a matter of "law." There is no appeal by the Crown on a question of fact. Mr. Botha who appeared for the ~~respondent~~ appellant correctly, in my opinion, conceded that the Crown was bound by the view taken by the

Provincial Division of the facts. We must, therefore, assume that the respondent received the watches from the thief knowing that they had been stolen - this was the view of the Provincial Division - as a pledge in security of a loan of £2. 10. 0d made to the thief. On that assumption it seems to me that the respondent was guilty of receiving. In receiving the stolen w atches as security for a loan he was protecting his own interests both as regards repayment and as regards the interest he had in retaining the good will of the thief who was his customer.

In Karolia's case (supra) the accused who was a general dealer bought butter from the complainant. When butter which he had bought was delivered to him from a lorry by a delivery boy he told the boy that if he could obtain another fifty pounds of butter he would give him £5. The boy succeeded in doing so, gave the stolen butter to the accused and was given £5. The accused was charged before a magistrate with receiving and he was convicted and sentenced to imprisonment and whipping. There was a note on the record that the verdict was not in terms of S.205 of Act 56 of 1955. This note was obviously made because if that verdict had been made in terms of that section whipping could not have been imposed. On appeal to the Transvaal Provincial Division it was held that the accused could be convicted neither of theft, because he was not charged with theft, nor of

receiving because he was proved not to have received stolen goods but to have stolen goods. The conviction and sentence were accordingly set aside.

In Karolia's case the Court said : "It would seem "from certain English authorities that were quoted in argument "that on the facts established by the evidence the accused could "not have been convicted in England of the crime of receiving "stolen property knowing it to have been stolen. The distinct-"ion between the crimes of theft and of receiving was of import-"ance in England because of the different punishments which could "follow ; the one" (theft or larceny as it is called in English law) "was a felony and the other a misdemeanour." The Court then quoted R. v Perkins (5 C.C.C. 554) and R. v Coggins (12 C.C.C. 517) and proceeding said : "In the present case..... "the accused would clearly have been guilty of theft as a principal "offender in English law and could not have been convicted of "the crime of receiving stolen property..... In my opinion "the offence" (of receiving) "now existing must be something "other than the common law offence of theft..... It is suffic-"ient for me to say that in my opinion if certain acts amount "strictly to the commission of theft by the accused, then such "acts cannot at the same constitute receiving."

The judgment in Karolia's case was influenced by English law and

also by another factor mentioned in the judgment viz: the specific mention of receiving in the amendment to Part II of the third schedule of Act 31 of 1917 made by Act 29 of 1955 whereby whipping became a compulsory factor. As regards the latter factor I need not repeat my reasons for holding that that factor cannot affect the interpretation to be placed on "receiving."

As regards the English law which influenced the Court in Karolia's case it is hardly necessary to repeat what Watermeyer J.A. said in Maserow's case (supra at p. 168) viz: "it must always be remembered that the English law on the sub-"ject of receiving is the result of a long, historical develop-"ment, consequently English decisions must be very carefully "examined before they can be accepted as being in agreement "with our law, but the reasons given by the English Judges may "be of great value." In the present case it is unnecessary to consider the reasons of the Judges in the English cases referred to by the Court in Karolia's case, as the matter has been settled by von Elling's case (supra) which was apparently not brought to the notice of the judge who delivered the judgment in Karolia's case. The accused in the latter case could have been charged with and found guilty of theft and he could

-as he was - be charged with and found guilty of receiving. Karolia's case was, in my opinion, wrongly decided.

The remaining question to be considered is the order which this Court ought to make in the present case. Under s. 105(1)(a) of Act 32 of 1944 this Court is empowered to reinstate the conviction and sentence of the magistrate's court either in its original form or in such a modified form as it may think desirable. Clearly the conviction in its original form must be reinstated. As regards the sentence we must for the purposes of this appeal accept the finding of fact by the Provincial Division, however wrong that finding may be. On the basis of that finding it may be said that the circumstances in which the crime was committed are not as serious as found by the magistrate. Justice will be done if the term of imprisonment is reduced from 5 to 2 months.

The appeal is allowed, the conviction of the respondent by the magistrate's court is reinstated : so too is the sentence excepting that the period of five months imprisonment with compulsory labour is reduced to two months imprisonment with compulsory labour.

Schreiner JA
Fagan JA
Reynolds JA
Beyers JA
} concur.