G.P.-S.117539—1954-5—5,000.

85/57
U.D.J. 145.

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

(Appellate DIVISION).
AFDELING).

(Orig. Record)

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

Guilherme Correia
Appellant.

versus/teen

The Queen
Respondent.

Appellant's Attorney McIntyre & Van der Post *Respondent's Attorney* A.G. C. Town
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate B. F. Banks *Respondent's Advocate* R. P. Rossouw
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on:— Friday, 29th Nov, 1957.
Op die rol geplaas vir verhoor op:—

(CAP)

1.2.4.6.11 (1)

9.45 - 12.35.

C.A.V.

JUDGMENT: MONDAY, 9th DECEMBER, 1957.

Appeal dismissed.

Coram: Fagan CJ, Schreiner, Steyn, Reynolds (Actg) et Price (Actg) JJA

Mostertmyer.
REGISTRAR
9/12/57

Original

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION.)

In the matter between:

GUILHERME CORREIA. ..... Appellant.

and

REGINA. ..... Respondent.

CORAM: Fagan C.J., Schreiner, Steyn JJ.A. et Reynolds, Price A.JJ.A.

HEARD: Friday, 29th November, 1957. DELIVERED: 9/12/57

J U D G M E N T.

REYNOLDS, A.J.A.:-

In this case the appellant was charged with, and convicted of, the offence of receiving property, well knowing it to have been stolen. That offence will simply be called receiving in this judgment. There is no appeal against the correctness of the conviction. But the appellant was sentenced to receive cuts in addition to imprisonment. In an able argument Mr. Banks, for Appellant, has argued that this sentence of cuts, imposed because of the provision in Part II of the Third Schedule to Act 62 of 1955 relating to compulsory whipping, was not competent since Appellant came within the exception stated in the provision. That provision reads:-

" Receiving.....2.

" 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)."

Appellant conspired with Williams to commit the actual, or what may be called the original theft as the evidence led at the trial proved. After Williams had stolen the flour, Appellant received it and became in addition the receiver. Since the evidence proved that Appellant was guilty of the original theft because of his conspiracy with Williams to steal it, Mr. Banks argued that Appellant was convicted in terms of Section 205 "on evidence establishing that the accused is in fact guilty of the theft of property" and reinforced this argument by reference to the case of Rex versus Naidoo 1949(4)S.A. p.858. This contention must be examined.

The Court is here dealing with what is to happen to Accused by way of punishment in consequence of the verdict against him. It is clear from Part 11, that Parliament drew a clear distinction between motor car thefts and ordinary

thefts.....3.

thefts. As to the former there was to be compulsory whipping but not as to the latter, and as to the latter a Magistrate could not impose a sentence of whipping in any event because of Section 92(3) of Act 32 of 1944 . But Parliament then went on to impose compulsory whipping on all receivers unless they could be brought within the meaning of the exception. It is thus clear that Parliament regarded the receiving of the proceeds of an ordinary theft as more serious than the ordinary theft itself when the thief solely steals.

Not every thief is a receiver, for he may take the stolen property and keep it himself. But in law every receiver is a thief, (Rex. Versus Maserow 1942 A.D. 164) With knowledge that the goods were stolen, if he appropriates the goods of another for himself and thus commits theft and receiving. This is confirmed by the Naidoo case itself. There Naidoo was not shown to have knowledge of any theft of t the goods when he bought them, but that knowledge came to him months later, and he retained the goods for himself and this c constituted theft by him as the Court held. In every receiving charge it is clearly necessary to prove the goods received had been stolen by some thief. Consequently whether or not the goods were received into possession either after a theft by another person, or after, as here, the receiver himself.....4.

self was in a conspiracy to steal but took no physical part in the actual original theft, there must inevitably be evidence on which a verdict of guilty of receiving must be based. Since that evidence must be the basis of a conviction in every case of receiving, it would follow from the argument of Mr Banks that Parliament enacted compulsory whipping for actual receivers in the first portion of the provision set out herein and then proceeded by this exception to say that that provision was to be cancelled out. Parliament could not have meant that when its dominant idea was that receivers should be whipped, and on this ground the appeal must fail.

It is, however, more satisfactory to see if the exception can have some other application pertinent to the case of Appellant which Parliament brought about, or tried to bring about. If Bardu's case, 1945 A.D. 813, was correctly decided then the exception could have some meaning. In that case that Appellant was held by Davis A.J.A. and Watermeyer C.J. to have been proved guilty solely of theft and not receiving, but it was held by them that he could be found guilty of receiving under Section 243 of Act 31 of 1916 (the equivalent of Section 205), and that there was no possible prejudice to him. That may be so, but it must not be forgotten that

in.....5.

in any record of convictions that Appellant would be recorded unfairly as guilty of receiving, which Parliament now regards as a more serious offence than ordinary theft. It is, however, not necessary to consider the correctness, or otherwise, of the reasoning adopted by the learned judges in that case. Clearly this reasoning was dissented from, and overruled, in the later case of Rex versus Naidoo and it is noteworthy that the reasoning in Bardu's case was overruled in a judgment of Watermeyer C.J. who concurred with Davis A.J. A. in Bardhu's case. The case of Naidoo shows that on a charge and proof of theft, a verdict of receiving is not competent where only theft and no receiving was shown to have taken place and it seems to me that Naidoo's case must be accepted as correct. But, of course, that case clearly shows that the words in the exception do not refer to any conviction for receiving on a charge where ordinary theft only is proved, and no receiving is proved. Naidoo's case was decided in 1949 and the legislation now under consideration was passed in 1955. I do not think it can rightly be contended that by the provision now being considered and passed in 1955, Parliament intended in some way to amend Section 205 as interpreted in the equivalent Section 243 by Naidoo's case. Section 205 is in the main portion of the Act and deals with what happens

before.....6

before and up to the stage of conviction. Neither in it, nor anywhere else in the main portion of the Act, is there anything authorizing that a person solely guilty of theft and not receiving can be convicted of receiving on a charge alleging theft, for that was the effect of the decision in Naidoo's case. The provision now under consideration is in the punishment portion of the Act dealing with what occurs after conviction. It would be remarkable indeed if Parliament intended by a provision in the punishment portion of the Act to amend a provision in the main portion which did not authorise a conviction at all in such a case - still less such a drastic result as to convict a man of the more serious crime of receiving when he was solely guilty of the offence of theft, which is not punishable by compulsory whipping as is receiving. I do not think, therefore, that there was any amendment of Section 205 by the provision under consideration.

It may be that in enacting the exception, Parliament was not aware of Naidoo's case and thought the law to be as set out in Bardhu's case even if it did not know of Bardhu's case. But even if that idea could possibly have any effect, that would not help Appellant. For Bardhu's case only applied to a person convicted under Section 243 on evidence proving he

was.....7.

was solely a thief and not actually in fact a receiver, whereas ~~xx~~ Appellant is certainly a receiver as well as a thief. Equally that would be the position here when Bardhu's case has been overruled as to its reasoning. It may be contended on the other hand that Parliament was aware of Naidoo's case and in some way was giving an interpretation of Section 205 favourable to the decision in Bardhu's case. I have difficulty in seeing that that can be so, but it is not necessary to discuss that question. It suffices to say that again this could not assist Appellant - ~~ar~~ indeed anyone guilty of actual receiving- for the reason already stated, that Bardhu's case did not deal with a person actually and in fact a receiver as was Appellant. It follows, therefore, that there is nothing in the exception enabling Appellant to escape whipping.

Original

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between:-

GUILHERME CORREIA Appellant

and

R E G I N A Respondent

Coram:Fagan,C.J.,Schreiner,Steyn,JJ.A.;Reynolds et Price AJJA

Heard: 29th November, 1957. Delivered: 9-12-1957

J U D G M E N T

STEYN J.A. :- I have arrived at the same conclusion as the Chief Justice, but on a different ground. For the reasons stated in his judgment there can, in my view, be little doubt that when the item here in question was inserted in the Third Schedule to the Act the decision in Rex v. Naidoo (1949(4)S.A.858) was either overlooked or deliberately ignored (probably the former) and that the exception to that item must be taken to proceed from the assumption that section 205(1) of the Act has the meaning given to the corresponding section in the 1917 Act in the decisions culminating in Rex v. Phardu (1945 A.D.813). The interpretation accepted in Naidoo's case would render the exception to this item inoperative and purposeless, since on that interpretation the case stated in the exception, i.e. of a person convicted

ee in terms of ("kragtens") section 205 of receiving, on evidence establishing that he is in fact guilty of theft, cannot arise. On that interpretation no person can be convicted of receiving except on evidence proving that he is a receiver, and section 205 does not confer any jurisdiction to the contrary. On the wellknown principle of construction ut magis valeat quam pereat, an interpretation rendering the exception ineffective should be avoided if the language so permits. The wording of the exception is not in itself so obscure as to preclude a rational meaning in the context. It is only by reason of Naidoo's case that it would become inoperative. That does not appear to me to be a result which cannot be avoided. The language used in the exception conveys by clear implication that under section 205 a person may be convicted of receiving stolen property on evidence proving that he is in fact guilty of the theft of the property and not of receiving it. The probabilities are unquestionably in favour of the view that what Parliament intended to exclude was a compulsory whipping in pursuance of a purely formal conviction under section 205 on a charge of receiving stolen property, when the evidence proves that the accused is in fact the thief and not a receiver. The language used in the exception conveys by clear implication

that/.....

that by reason of the provisions of section 205 such a conviction may take place. This may, I think, properly be regarded as being of the nature of a declaratory provision in regard to the meaning to be given to section 205(1), and if this implied declaratory provision is observed in the interpretation of that section, the difficulty, on the one hand, of giving any effect at all to the exception, disappears, while on the other hand section 205 would, by a reversion to the more operative meaning adopted in Bardhu's case, shed the status given to it by Naidoo's case of a mere relic of a formalism which our law of criminal procedure has long outgrown, but which has nevertheless been retained in our legislation. I do not, however, wish to convey that Naidoo's case was wrongly decided. For present purposes the merits of that decision as at the time it was given, as compared with the view expressed in Bardhu's case, are not in issue. Both cases were decided before the enactment of the provision with which we are here concerned, by which a new factor was introduced into the interpretation of section 205. This provision having been enacted in terms impliedly declaratory of the meaning of section 205, the latter section can no longer be interpreted without reference to it. Section 205

must/.....

must of necessity now be read with it. Once that is done, the interpretation followed in Pardhu's case would seem to reflect the true present meaning of section 205(1). Had it appeared, therefore, that the appellant was convicted on the charge of receiving stolen property on evidence proving not that he is guilty of this charge but of the theft of the goods alleged to have been received by him, his case would have been covered by the exception. As he was not so convicted, the appeal must fail.

L. C. Stephen

Original

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between:-

GUILHERME CORREIA Appellant

and

R E G I N A Respondent

Coram: Fagan, C.J. Schreiner, Steyn JJ.A., Reynolds et Price AJJA.

Heard: 29th November, 1957. Delivered: 9-12-1957

J U D G M E N T

SCHREINER J.A. :- I have had the advantage of reading the judgments of the Chief Justice and of STEYN J.A. and have reached the same conclusion but on somewhat different lines.

The difficulty occasioned by the amendment made to Part II of the Third Schedule to Act 31 of 1917 by section 62 of Act 29 of 1955 was explained and considered in Regina v. Arbee (1956(4)S.A.438 at pages 442 and 443). CENTLIVRES C.J. concluded his remarks on the subject by saying that it was not necessary to decide whether the construction placed upon section 243 of Act 31 of 1917 by this Court in Rex v. Naidoo (1949(4)S.A.858) should be revised.

The/.....

The question arises again in the present appeal, under the corresponding provisions of Act 56 of 1955. I am satisfied that we should not depart from Rex v. Naidoo. It suffices to say that it has not been shown to have been wrongly decided.

Once the Naidoo decision stands, it fixes the meaning of the old section 243 (now section 205) at the date of the decision in 1949. I do not find it possible to treat the 1955 amendment of the schedule as changing the meaning of section 243 i.e. section 205. The law does recognise what is called "parliamentary exposition", of which use was made in one of the judgments in Patel v. Minister of the Interior (1955(2)S.A.485 at page 493). And akin to, if it is not in essence only a form of,parliamentary exposition is the treatment of amendments as capable of modifying the meaning of their context when the Act as amended is read as a whole.(New Mines Ltd. v. Commissioner for Inland Revenue, 1938 A.D.455 at page 463). The effect of an amendment on the rest of the Act can be properly tested by seeing whether a case determining the interpretation of the Act would have been differently decided if the amendment had formed part of the Act. If one imagines the 1955 amendment to have been in Act 31 of 1917 when Naaidoo's

case/.....

case was decided, the outcome could not in my view have been different. It would not, I think, have been right for the Court to allow a provision adding an item to a schedule dealing with minimum punishments to bear decisively upon the interpretation of the old section 243. The dominating factor must have remained the recurrence of some such expression as "if such be the facts proved" in the sections mentioned on page 863 of Naidoo's case.

I think, therefore, that full effect must be given to-day to the Naidoo decision, and in accordance with it there can be no ~~possibility of~~ a case in which, on a charge of receiving, a verdict of guilty of receiving could properly be reached only under section 205, but not otherwise. In all cases where section 205 could be used to convict of receiving it is unnecessary to use it.

In Arbee's case it was with due caution suggested that when the receiver item was intrpduced into the Schedule the legislature might have overlooked Naidoo's case. Although there is a strong presumption against anything of the sort having happened I find it difficult to come to any other conclusion than that this did actually take place, if any consideration of the problem is to have a rational basis. If in 1955 the Legislature

proceeded upon a wrong assumption as to what the existing law was, its mistake could not change that law (cf.Ormond Investment Co. v. Betts, 1928 A.C.143 at pages 156, 164 and 165). But whatever may be the explanation of the form of the provisions, the function of the Court is of course to give effect to their language properly construed.

In the receiver item the Legislature distinguished two cases of receiving -

(a)cases where there was a conviction in terms of (kragtens) section 205, and

(b) other cases.

According to the language used the distinction is made to depend not on the nature of the receiving but on the way the conviction is arrived at. This would be quite clear if the exception had stopped at the word "five", thus reading "except in the case of a conviction in terms of section "two hundred and five" . What follows seems to me to make no difference to the interpretation. The words "on evidence "establishing that the accused is in fact guilty of the theft "of property" add nothing, for that would have to be the kind of evidence in order that section 205 should operate. These words were, in my view, only introduced to form the basis for the last part of the exception to cases where

section/.....

section 205 is used and theft is proved other than cases of theft where whipping was required in terms of the rest of the amendment introduced by section 62 of Act 29 of 1955.

For present purposes therefore, we can conveniently regard the receiver item as requiring whipping to be imposed "except in the case of a conviction "in terms of section two hundred and five". As I have already indicated this language makes the test what the trial court actually does, not whether it could have done something else. It cannot logically be reasoned that because the appellant was particeps criminis in the theft by Williams the conviction of the appellant could only be justified by the use of section 205. The magistrate was not obliged to rely on section 205 and he did not in fact do so.

This seems to me to conclude the matter against the appellant. The result of this approach is no doubt to leave in the magistrate's hands the decision whether he should use section 205 or not, and since it can never make any difference to the conviction aspect whether he refers to section 205 or not it amounts to a mere matter of the use of words. If the magistrate uses one form of words he has, in view of the general limits of his jurisdiction, no discretion to impose a sentence of whipping on

a/.....

Original

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between :

GUILHERME CORREIA Appellant

&

R E G I N A Respondent

CORAM : Fagan C.J., Schreiner, Steyn, JJ.A. Reynolds et Price A.JJ.A.

Heard : 29th Nov. 1957. Delivered : 9-12-57

J U D G M E N T

FAGAN C.J. :- The appellant, who is under fifty years of age, was charged before an Additional Magistrate of Cape Town with the crime of receiving stolen property well knowing it to have been stolen. He was found guilty, and was sentenced to two months' imprisonment with compulsory labour and to receive a whipping of four strokes with a cane. He appealed unsuccessfully to the Cape Provincial Division, but was given leave to appeal to this Court.

The evidence clearly established the appellant's guilt, and the appeal to this Court is directed solely against the sentence of whipping.

That sentence was imposed by virtue of section 329(2)(a)

of the Criminal Procedure Act No. 56 of 1955, read with Part II of the Third Schedule to the Act. These provisions make whipping compulsory in the case of a person not over fifty years of age who is convicted of, inter alia, the offence of :-

" 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 evidence showed that the man who had taken the goods from the proprietor and delivered them to the appellant had done so under a prior arrangement with the appellant. On these facts the appellant had been socius criminis with the thief who did the actual stealing and was himself guilty of theft.

This does not mean, however, that he was not also guilty of receiving. In Ex parte Minister of Justice : In re Rex v Maserow and Another, 1942 A.D. 164, Watermeyer J.A. at pages 169-170, said :

" If the word 'theft' be used in its proper legal sense, viz. a dishonest appropriation (fraudulosa contrectatio) of another's property, then receiving is as a rule merely a particular form of theft. "

He proceeded to say that a person who receives stolen

property from the thief knowing it to have been stolen may fall into one of several classes. He mentioned four such classes, of which I shall quote Nos. 2 and 4 :

" 2. He may be socius in the crime of theft, e.g. when he has acted in concert with the thief and agreed before the taking that he would receive and assist to dispose of the stolen property.

4. He may be a receiver in what I may call the proper sense, viz. one who acquired the stolen property from the thief not for the purpose of assisting the thief but for his own profit or gain. "

"In the second and fourth cases," said the learned Judge, "the receiver is clearly guilty of theft ; " and he quoted a number of decisions in support of that proposition.

The appellant in the case before us falls in the second class. It follows that, although he might have been charged with and convicted of theft, he was also guilty of receiving and was rightly charged with and convicted of that crime.

Mr. Banks submitted that, as the evidence showed him to be guilty of theft, his conviction on the charge of receiving was really "a conviction in terms of section two hundred and five on "evidence establishing that the accused is in fact guilty of theft" within the meaning of the exception in the passage I have quoted above from the Third Schedule to the Act.

Section 205(1) reads :

" 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 with which he is actually charged, he may be convicted of the offence with which he is so charged. "

By virtue of section 200 "any person charged with theft may "be found guilty of receiving stolen goods knowing them to have "been stolen..... if such be the facts proved. " On a charge of receiving, however, there cannot be a verdict of guilty of theft (R. v Arbee, 1954 (4) SA 435

In the old Code, Act 31 of 1917, the provisions corresponding to the new sections 205(1) and 200 - not in identical wording but to the same effect - were sections 243(1) and 238 respectively.

The construction placed on these provisions in two Transvaal decisions - Rex v Attia, 1937 T.P.D. 102, and Rex v Van der Bank, 1941 T.P.D. 307 - and by Davis A.J.A., in a judgment concurred in by Watermeyer C.J., in Rex v Bhardu, 1945 A.D. 813 at p. 825, was to the effect that a person charged with receiving may, if the evidence proves him to have committed theft, be convicted of receiving even though there is no evidence of receiving. Watermeyer C.J. subsequently changed his opinion, and ~~four years later~~, in Rex v Naidoo, 1949 (4) S.A. 858 (A.D.), a bench over which he presided unanimously held (I quote from the head-note) :

" Section 243 of Act 31 of 1917 comes into operation

" when the evidence shows that the crime charged has been committed even though the evidence also proves the commission of a more comprehensive offence, of which the crime charged forms a constituent part.

Conviction for a crime different from the one charged is only lawful when the evidence proves the commission of the different crime, particularly in regard to the crimes of theft and receiving.

Section 243 does not operate to enlarge the powers of the Court by authorising it to convict for receiving on a charge of theft in cases other than those in which it is permitted to do so by virtue of the provisions of sections 238 or 242 both of which require proof of receiving to be given before a conviction for receiving can take place. "

The section in the new Act corresponding to the old 242 is 204, which reads :

" If in any other case not hereinbefore specified the commission of the offence with which the accused is charged as defined in the law creating the offence or as set forth in the charge, includes the commission of any other offence, the accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved. "

In R. v Arbee, (Supra), Centlivres C.J. said that the relevant item (the one now under consideration) in Part II of the Third Schedule to Act 56 of 1955 occasioned him some difficulty. He proceeded (at pp. 442-443) :

" 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 section 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 sec. 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 in terms of sec. 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 sec. 205. ~~xxx~~ 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 sec. 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 (A.D.) 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 sec. 205 be found guilty of receiving. To attribute a different intention to the

" Legislature would lead to an absurd result in a case where an accused ~~xxxxxx~~ instigates another person to steal who then steals the 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 Jaidoo on the old sec. 243 (now the new sec. 205) should be revised. "

If section 205(1) is read by itself, without reference to the specific sections which authorise convictions for offences other than those with which the accused is charged - eg., in the case of receiving, without reference to section 200 - the natural construction would be that put upon the corresponding section of the old Act in Rex v Bhardu. It is literally what the words say. On that construction the item I have quoted from the Third Schedule to the 1955 Act would not merely be perfectly intelligible and be a very reasonable provision if it would be a highly necessary one in order to prevent a man who had only committed theft, for which whipping is not compulsory and on a first conviction by a magistrate is not even permissible (vide the Magistrates' Court Act, No. 32 of 1944, section 92(3)), from being whipped as a receiver though in fact he never was one. If in 1955 Parliament, whether aware of Bhardu's case or not but without having its attention drawn to Jaidoo's

case, had read section 205(1) in its literal meaning, it would have felt bound to introduce the exception contained in the Schedule item under discussion. On the other hand, a reading of section 205(1) in the sense put upon the old section 243(1) in Naidoo's case leaves no room for a conviction for receiving unless receiving is proved.

Mr. Banks referred us to authorities for the proposition that Parliament, when legislating on a matter that has been dealt with by the Courts, should be presumed to have been aware of the relevant judicial decisions - (Halsbury, Hailsham Edition, Vol. 31, par. 624, pp. 491-492 ; R. v Papashane, 1946 O.P.D. 70 at pp. 73-74 ; R. v Sharp, 1957 (3) S.A. 703 at p. 706 (C.P.D.)). I do not take this to mean that we cannot, in a clear case, say that even Parliament overlooked Naidoo's case. It contains, as I have said, a provision which in that event must have appeared very necessary. Apart even from the reference to Sec. 205, the words "a conviction (of receiving)..... on evidence establishing that the accused is in fact guilty of the "theft of property" - , in the Afrikaans text, which was the one signed by the Governor-General : "op getuienis waardeur bewys "word dat die beskuldigde inderdaad skuldig is aan diefstal van "goed" - aptly indicate the case where there is a conviction

for receiving on evidence which proves theft, not receiving. And the indication that that is what the draftsman had in mind seems to me to be confirmed, if confirmation is required, by the exclusion from the exception of the case where the conviction is on evidence establishing the theft of "a motor "vehicle or property stolen from a motor vehicle or part thereof "which was properly locked" ; for that kind of theft, without any receiving, is punishable, just like receiving, by compulsory whipping (vide item in the Schedule immediately preceding the one under discussion).

Mr. Banks pointed to the definite article before the word "theft" - "On evidence establishing that the accused is "in fact guilty of the theft of property" - as showing an intention by Parliament to exclude from compulsory whipping the case where the accused, being both thief and receiver, was socius criminis in the original theft, while leaving the compulsory whipping provisions to apply to the ~~one~~ who only became an accessory to the theft (as well as the receiver) at a later stage. The Afrikaans version - "dat die beskul- "digde inderdaad skuldig is aan diefstal van goed" - has no definite article in the corresponding position ; but in any event I cannot read into the English phrase "the theft of

"property" in this context the subtle distinction from "theft of "property" which Mr. Banks asks us to see in it.

Naidoo's case was a decision of this Court given - as is clear from the judgment - after very full consideration. I see no good ground on which we can consider overruling it. If it is correct, and its reasoning is applied, as it must be, to sec. 205(1) of the present Criminal Procedure Act, I can think of no case in which an accused can be convicted of receiving unless the evidence proves him to be guilty of receiving. And if on a charge of receiving the evidence proves him to be guilty of receiving, the Court can clearly convict him without invoking the special power which section 205(1) purports to give it.

In other words, in respect of receiving there can never be any need for the operation of section 205. Indeed, I think I can say that not only can there never be any need for its operation ; there can never be any room for it, for a conviction for receiving must be ~~on a charge of receiving~~ proved by evidence of receiving ; then it rests on that ~~charge and that~~ evidence, and does not come about "kragtens artikel tweehonderd-en-vyf" - "in "terms of section two hundred and five."

~~I have used here~~ He quoted words occur~~ring~~ in the exception we are discussing (in the Third Schedule to the Act), ~~to show how this~~ My reasoning compels ~~us~~ me to say also that the exception is ineffective,

Mr. Banks is therefore asking us to strain the language of the exception so as to give it a meaning which is not suggested by the words to have been present to the draftsman's mind. True, if words in a criminal statute are capable of more than one meaning we should choose the one most favourable to the accused. But the words do not seem to me to be capable of the meaning which Mr. Banks wants us to ascribe to them. And we are asked to strain the meaning of the words, not to avoid an absurdity (cf. Venter v Rex, 1907 T.S. 910 at pp. 914-915), but to give the exception the absurd meaning that an aggravation of the convicted man's offence should mitigate his punishment.

The apparent ineffectiveness of the exception can be no reason for us to strain the language into an absurd meaning. I have already suggested the possibility that Parliament may have overlooked Naidoo's case. Even if it did not, it might have felt some uncertainty as to whether that decision eliminated all possibility of an accused being whipped as a receiver when he had only committed theft - even the possibility that some magistrate might miss the Naidoo judgment and give Sec. 205 its literal meaning. If Parliament had any such fears the exception may well have been inserted ex abundanti cautela.

However, it is unnecessary for me to speculate about the reason for the insertion of the exception or even to make sure of its precise meaning, as long as I am satisfied - and I am - that it does not bear a meaning which will in the case before us entitle us to set aside the sentence of whipping.

The appeal is therefore dismissed.

J. K. Fagan

~~Schreiner J.A.~~
~~Steyn J.A.~~
~~Reynolds A.J.A.~~
Price A.J.A. Concurs.