RAM SUBHAG *v.* THE POLICE

[Appellate Jurisdiction (Seton, C.J.) March 5th, 1948]

Ss. 322 (a) and 335 of the Penal Code—store breaking—receiving—s. 178 of Criminal Procedure Code—alternative offences—s. 167 of Criminal Procedure Code.

The appellant was charged with breaking and entering a store and stealing a quantity of merchandise therefrom contrary to section 322 (*a*) of the Penal Code. He was found not guilty of that offence but guilty of receiving stolen property contrary to section 335 of the Penal Code by the Magistrate's Court, Lautoka.

He appealed on the ground that having been charged with housebreaking and larceny and acquitted on those charges, the Magistrate at his trial had no power to convict him of receiving in the absence of a separate count charging him with that offence.

On appeal from the Magistrate's Court.

HELD.—That when a person is charged with housebreaking and larceny he cannot be convicted of the alternative offence of receiving which is not charged in the information.

K. A. Stuart for the appellant.

B. A. Doyle, Solicitor-General, for the respondent.

SETON, C.J.—It is to be noticed that the information charged two offences in one count, viz., housebreaking and larceny but this has always been held to be good notwithstanding the rule against duplicity. However, to obtain a conviction under section 322 (*a*), the prosecution must prove both the housebreaking and the larceny. By section 178 of the Criminal Procedure Code, a person charged with housebreaking but found not guilty of that offence may be convicted of any of the kindred offences mentioned in Chapter XXXII of the Penal Code, although not charged with them; receiving stolen property is not one of these. But under section 179 of the Criminal Procedure Code it is provided that when a person is charged with the larceny of anything and it is proved that he received the thing knowing the same to be stolen, he may be convicted of the offence of receiving although he was not charged with it. These sections correspond exactly with English law.

The appellant was charged with housebreaking and he was also charged with larceny. One would therefore suppose that it was open to the Magistrate, having found him not guilty of those offences, to find him guilty either of one of the kindred offences mentioned in Chapter XXXII of the Penal Code, or of receiving.

Mr. Stuart who represented the appellant and the learned Solicitor-General who appeared for the Crown were agreed that it was not so and that in such a case the Magistrate could only find the appellant guilty of an offence kindred to housebreaking. I think that they are right although I do not pretend to know the reason. Mr. Doyle suggested that it was because the charge of larceny was only incidental to the charge of housebreaking which is true in a sense but it does not seem to me to be an adequate explanation for disregarding what appears to be a clear provision of the law, namely, that a person charged with

larceny and acquitted of that offence may be convicted of receiving although he was not charged with it. However, there seems to be no doubt upon the point. Curiously enough, neither Mr. Stuart nor the Solicitor-General were able to cite an English authority in support of their view, although Mr. Stuart had succeeded in finding two Colonial cases—one South African and the other Canadian—where convictions for receiving in circumstances similar to those here had been quashed. And there is this significant statement in *Archbold's Criminal Pleading, Practice and Procedure,* 31st Ed. at p. 614 when dealing with the offences of burglary and larceny: " It is usual and proper to add a count for receiving where the felony intended and committed was larceny."

The learned Magistrate relied not only upon section 179 of the Criminal Procedure Code but also on section 167 of the same which provides that when a person is charged with an offence, only a part of which is proved but that part constitutes a minor offence, he may be convicted of that minor offence although not charged with it. But receiving is not a minor offence; the maximum punishment for it, where the stolen property has been acquired as the result of a felony, is the same as for housebreaking. Clearly, this section cannot apply.

Appeal allowed, conviction quashed.