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JOSEVA NAEQE

v.

REGINAM

B [SUPREME COURT, 1964 (Know-Mawer Ag. P.J.), 10th, 24th January.]

Appellate Jurisdiction

Criminal law—receiving stolen property—acquisition by accused of joint possession with thieves—whether a sufficient receiving—felonious intent—Penal Code (Cap. 8) ss.327(a), 340(1)(a), 416, 417.

C *Criminal law—practice and procedure—alternative counts—Criminal Procedure Code (Cap. 9) ss.193, 206—Penal Code (Cap. 8) s.38.*

Criminal law—practice and procedure—same magistrate presiding at trials of thieves and of receiver.

D A magistrate is not disqualified from trying an accused person on a charge of receiving stolen property merely because he had previously sentenced other persons on their plea of guilty to larceny of that property.

Parbhu v the Police (1950) 4 F.L.R. 31, distinguished.

E The appellant was convicted of receiving stolen property contrary to section 340 (1) (a) of the Penal Code; he was discharged on a count (described in the charge as "alternative") for being an accessory after the fact to storebreaking and larceny, contrary to section 327 (a) of the Penal Code. It was proved that the appellant brought his car to where gelignite, which he knew to be stolen, was hidden, and was in company with the thieves when it was loaded into the boot of his car; he spent the next twenty-four hours arranging for the disposal of the gelignite.

F *Held:* 1. That the appellant had at least joint control of the stolen property and that a person having joint possession with the thieves of stolen property may be convicted of receiving it.

R. v Seiga [1961] 45 Cr.App. R. 26, followed.

G 2. That though the magistrate had not specifically directed himself that it must be established that the receiving was with felonious intent, on the facts it was clearly a felonious receiving.

3. That the count for being an accessory after the fact to storebreaking and larceny was not strictly an alternative count to that of receiving, and the appellant was entitled to be acquitted thereon.

H Observations on the correct procedure in relation to alternative counts properly so called.

Cases referred to:

R. v. Wiley (1850) 2 Den. 37; 169 E.R. 408: *R. v. Berger* (1915) 11

Cr. App. R.72; 84 L.J.K.B. 541: *R. v. Watson* (1916) 12 Cr. App. R.62; [1916] 2 K.B. 385: *R. v. Andrews and Craig* [1962] 1 W.L.R. 1472; 47 Cr. App. R.32: *R. v. Pardoe* [1963] Crim. L.R. 265: *R. v. Matthews* [1950] 1 All E.R.137; 34 Cr. App. R.55: *R. v. Seymour* [1954] 1 W.L.R. 678; 38 Cr. App. R.68: *R. v. Roma* [1956] Crim. L.R.46: *Sheik Anwar v. R.* Criminal Appeal No. 64 of 1960 (unreported).

Appeal against conviction by a Magistrate's Court.

S. M. Koya for the appellant.

B. A. Palmer for the Crown.

The facts sufficiently appear from the judgment.

KNOX-MAWER Ag. P.J.: [24th January, 1964]—

The appellant was charged before the Magistrate's Court of the First Class, Tavua, with the following offences:

FIRST COUNT

Statement of Offence (a)

RECEIVING STOLEN PROPERTY. Contrary to Section 340 (1) (a) of the Penal Code, Cap. 8.

Particulars of Offence (b)

JOSEVA NAEQE, on the 26th Day of August, 1963, at Vatukoula, Tavua, in the Western Division received nine cases of gelignite valued at £67/10/0 knowing the same to have been stolen.

ALTERNATIVE COUNT

Statement of Offence

ACCESSORY AFTER THE FACT TO STOREBREAKING AND LARCENY. Contrary to section 327 (a) of the Penal Code, Cap. 8., as read with section 416 and 417 of the Penal Code, Cap. 8.

Particulars of Offence

JOSEVA NAEQE, on or about the 26th day of August, 1963, at Vatukoula, Tavua, in the Western Division, assisted LEMEKI VUETI and ISARELI NENE, who were, to his knowledge guilty of the offence of storebreaking and larceny in order to enable them to escape punishment."

The appellant was convicted upon the first count and sentenced to 2 years imprisonment. The prosecuting officer then asked the learned trial Magistrate to discharge the appellant on the second (alternative) count, which the Magistrate did.

The first ground of appeal reads as follows:

"*THAT* the learned trial Magistrate ought not to have tried your Petitioner inasmuch as the learned trial Magistrate had already tried and sentenced the alleged thieves of the Gelignite in question on the 29th day of August, 1963 at Tavua in Criminal Case No. 147 of 1963—*Regina vs. Lemeki Vueti and Isareli Nene* wherein the accused were charged with Larceny of the said Gelignite.

In support of this ground of appeal learned Counsel for the appellant relies upon a judgment of this Court in *Parbhu (f/n Daya) v. The Police,* reported in F.L.R. Vol. 4 at p.31.

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In that case the appellant had been convicted by the Magistrate of receiving stolen property. Immediately prior to the trial of the appellant the same Magistrate had convicted another person of the larceny of the property which the appellant was charged with receiving. When the trial of the appellant was opened his Counsel asked that the case should be taken by another Magistrate. In refusing this request the Magistrate stated—

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> "I found in the last case that the defendant sold the goods in question to Parbhu (the appellant) . . . I do not consider that Parbhu (the appellant) would suffer any disadvantage by my hearing the case."

The learned Chief Justice held as follows:

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> "In this matter the learned Magistrate very seriously misdirected himself. The receiving of the stolen property by the accused was a fact in issue in the trial before him—the onus was upon the prosecution to rebut the presumption of innocence and prove to the Magistrate's satisfaction beyond reasonable doubt that the accused received the property in question. The learned Magistrate, however, began the trial of the accused before him on a charge of receiving stolen property, having already decided on evidence given in another case, of the nature and value of which this court is in complete ignorance, that the accused had in fact received the stolen property from Emori. It was impossible, therefore, for the Magistrate to consider with an open mind the accused's defence which was that he did not in fact receive the property but that it was placed where it was found by someone else without his knowledge. On this ground alone the conviction of the appellant by the learned Magistrate in the circumstances set out constituted a grave miscarriage of justice."

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The circumstances of the present case were quite different from those pertaining in *Parbhu.* Here the two thieves (Lemeki Vueti and Isareli Nene) had pleaded guilty, before Mr. Anderson, to breaking into the Emperor Goldmining Company's store and stealing the gelignite. The facts relating solely to that offence were placed before him. No mention whatsoever was made of the present appellant. The thieves agreed with the facts and Mr. Anderson thereupon convicted them of storebreaking and larceny. Unlike the Magistrate in Parbhu's case, Mr. Anderson made no finding to the effect that the appellant had received the stolen property. He made no reference at all to the appellant. Moreover, when the present appellant's trial commenced, his counsel raised no objection to Mr. Anderson's hearing this case.

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There is, I find, no substance in this first ground of appeal.

The next two grounds of appeal are as follows:

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> "*THAT* the learned trial Magistrate erred in holding that your Petitioner was in the joint possession of the Gelignite with other persons.

> *THAT* the Learned Trial Magistrate erred in holding that your Petitioner was in possession of the stolen gelignite and therefore guilty of the offence of Receiving Stolen Property when in fact the entire Prosecution's evidence raised the inference that your Petitioner was assisting the thieves in the disposal of the stolen gelignite. Consequently there has been a substantial miscarriage of justice."

In arguing these grounds of appeal learned Counsel have referred me to a number of authorities: *Wiley* (1850) 2 Den. 37, *Berger* (1915) 11 Cr. App. R. 72, *Watson* (1916) 12 Cr. App. R. 62, Seiga 56 Cr. App. R. 26, *R. v. Andrews & Craig* [1962] 1 W.L.R. 1474, *Pardoe* [1963] Crim. L.R. 265.

As is made clear in the judgement of the Court of Criminal Appeal in *Seiga* a person having joint possession of stolen property with the thieves may be convicted as a receiver.

The Crown established in the present case the following facts beyond all reasonable doubt. That on the 26th August, 1963, Lemeki Vueti and Isareli Nene broke into the Emperor Goldmining Company's store at Vatukoula, stole 9 cases of gelignite, valued at £67-10-0, and hid it nearby. Later that night the appellant accompanied by Isareli, brought his car from Tavua to the place where the stolen property was hidden. There the stolen property was loaded into the boot of the appellant's car. Lemeki Vueti, Isareli Nene, and the appellant, were all together during this part of the operation. The appellant spent the next twenty-four hours or more, arranging the disposal of the stolen gelignite.

It is quite certain therefore, upon the whole of the evidence, that the appellant had at least joint control (along with the thieves) of the stolen property. Indeed during the final stage of the enterprise, the appellant had far more control over the property, and over its ultimate disposal, than had the thieves. That the appellant knew when he received the property that it was stolen is also beyond doubt. There is no substance in these two grounds of appeal.

The next ground of appeal is as follows:

> "*THAT* the Learned Trial Magistrate erred in law in not directing himself that one of the essential elements to prove the offence of Receiving Stolen Property is that it must be established that the accused received the stolen property with a felonious intent. Consequently there has been a substantial miscarriage of justice."

It is true that the learned trial Magistrate has not specifically directed himself on this issue. The law in this connection was clarified too in *R. v. Matthews* [1950] 1 All E.R. 137. However, there could be no question of any innocent receipt by the appellant upon the facts established in this case. This was clearly a felonious receiving. There is therefore no real substance in this ground of appeal.

The appeal against the conviction recorded upon Count 1 is accordingly dismissed.

There is however another ground of appeal relating to the order made in respect of the other count. This reads as follows:

A "*THAT* at the end of the Defence case the Learned Trial Magistrate was obliged in law either to convict or acquit your Petitioner on the 2nd count and the Learned Trial Magistrate erred in discharging your Petitioner on the 2nd count when he was entitled to an acquittal as of right."

The second count is styled an "alternative" count and was in fact
B regarded as such by the Crown, the Defence, and the learned trial Magistrate. It is however possible to envisage a case where a person could be convicted of both 'receiving' and of assisting the thieves to escape punishment. In so far therefore as Count 2 is not strictly an "alternative" count I think the appellant should here have been acquitted thereon, and I so direct.

C Discussion ensued during this appeal as to the correct procedure to be followed, in the Magistrates' Courts in relation to an "alternative" count, (properly so called). I will therefore take this opportunity of expressing an opinion on this.

In England, where an indictment contains what are strictly "alternative" counts, (for example 'larceny' and 'receiving') if the jury
D convict on one count they are discharged from giving a verdict on the other (*R. v. Seymour* [1954] 1 W.L.R. 678; 38 Cr. App. R. 68 and *R. v. Roma* [1956] Crim. L.R. 46). In Fiji, a Magistrate is both judge and jury. Having convicted upon the one count therefore, the correct course is for the Magistrate to discharge himself from giving a verdict on the "alternative" count. It should be emphasised that in doing this a Magistrate is not making an order of discharge under
E section 193 of the Criminal Procedure Code. That section has no application to this particular problem. The other point which I wish to emphasise is that in discharging himself from giving a verdict on the "alternative" count a Magistrate does not thereby contravene Section 206 of the Criminal Procedure Code, in so far as he will (on one of the alternative counts) have "convicted the accused and passed sentence upon him", which is one of the orders that Section
F 206 requires the Court to make. For convenience of reference Section 206 reads:

" 206. The court having heard both the prosecutor and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to law or shall acquit him or make an
G order under the provisions of section 38 of the Penal Code. (Substituted by 24 of 1950, s.14)."

The position is thus entirely distinguishable from that which arose in *Sheik Anwar v. Reginam,* Criminal Appeal No. 64 of 1960. There, the learned trial Magistrate had not complied with Section 206 at all, because upon the single count under which Sheik Anwar was
H charged, the Magistrate had neither (as required by Section 206 C.P.C.) "convicted", "made an order according to law", "acquitted", nor "made an order under Section 38 of the Penal Code". Instead the learned Magistrate had purported to make an order of discharge

under Section 193 of the Criminal Procedure Code. However his order under Section 193 was not validly made because the provisions of Section 193 did not permit of such an order in the circumstances then pertaining in that case. It was not therefore "an order according to law" satisfying Section 206 of the Criminal Procedure Code. Accordingly the case had to be remitted to the Magistrate directing him to make a valid order under Section 206 of the Criminal Procedure Code. A

Appeal on first count dismissed; acquittal directed on second count