Privy Council Appeal No. 5 of 1987

The Attorney General of Hong Kong — *Appellant*

v.

Yip Kai Foon — *Respondent*

FROM

THE HIGH COURT OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH DECEMBER 1987

Present at the Hearing:

LORD BRANDON OF OAKBROOK
LORD ACKNER
LORD OLIVER OF AYLMERTON
SIR JOHN STEPHENSON
SIR EDWARD EVELEIGH

*[Delivered by **Lord Ackner**]*

In October 1985, in the Supreme Court of Hong Kong, in a trial by jury presided over by Hooper J., the respondent was indicted on four counts.

1. The first count was robbery; that the respondent together with other persons unknown on 10th October 1984 robbed the staff of the King Fook Jewellery Co. Ltd. of gold ornaments and watches to the value of HK$1,200,000.00. The respondent was unanimously convicted of the offence of handling stolen property, which in Hong Kong is a statutory alternative to the count of robbery.

2. The second count also alleged robbery; that the respondent together with other persons unknown on 27th October 1984 robbed the staff of Dickson Jewellery Co. Ltd. of watches and jewellery to the value of HK$1,000,000.00. The respondent was again unanimously convicted of the offence of handling stolen property, as a statutory alternative.

3. The third count alleged possession of firearms and ammunition without licences. The respondent was unanimously convicted on this count.

4. The fourth count alleged the use of a loaded firearm with intent to resist arrest. The respondent was unanimously convicted on this count.

The respondent was duly sentenced to six years' imprisonment to run concurrently on the two handling charges, and twelve years' imprisonment to run concurrently on the two firearms offences, these sentences however to run consecutively to the sentences on the handling offences. Thus a total of eighteen years' imprisonment was imposed. Mr. Tsui Kim-ming, who was the second defendant, was tried together with the respondent, but the only count against him was handling stolen goods, contrary to section 24(1) of the Theft Ordinance (Cap. 210). He was unanimously convicted of this offence and sentenced to four years' imprisonment. He has not appealed.

On 22nd May 1986 the Court of Appeal of Hong Kong (Li V.-P., Kempster J.A. and Power J.) refused the respondent leave to appeal in respect of the firearms offences, but allowed his appeal against the handling offences and ordered a re-trial. The primary basis of the Court of Appeal's decision was that the learned trial judge had misdirected the jury when he informed them that, if they were satisfied beyond reasonable doubt that the respondent was guilty either of robbery or handling stolen goods, they should convict "according to which is more probable or likely in the circumstances. He [the respondent] is not entitled to be acquitted altogether merely because there may be some doubt as to which of the two offences he has committed". The secondary basis of the Court of Appeal's decision appears to be that the learned judge failed properly to direct the jury as to an essential ingredient of the offence of handling.

The facts.

On 10th October 1984 an armed robbery took place at the King Fook Jewellery Co. Ltd., when a large quantity of gold ornaments and watches were taken. On 27th October 1984 an armed robbery took place at Dickson Jewellery Co. Ltd. Once more watches and jewellery were stolen. During the course of both of these robberies shots were fired. On 22nd December 1984 police Sergeant Liu, posing as a potential buyer, met the second defendant who told him that there was a batch of watches worth HK$1.2 million for sale at HK$240,000. The second defendant claimed to be the middleman and agreed to arrange a meeting with the seller of the goods. On 28th December the meeting took place. Sergeant Liu was taken by the second defendant to meet the respondent and, according to the police officer, they arranged to

complete the transaction at a fixed time shortly thereafter. At the appointed hour, according to the Sergeant, he met the respondent and the second defendant. Sergeant Liu took the respondent to the police car where one of his colleagues, Sergeant Li showed him the money available to purchase the goods. Thus reassured, the respondent then took Sergeant Liu to a car where he was shown a quantity of watches, many of them still bearing the labels of King Fook Jewellery Co. Ltd. and Dickson Jewellery Co. Ltd. Sergeant Liu then went to fetch the money from the police car, returning with Sergeant Li. While the respondent was counting the money, Sergeant Li revealed his identity, whereupon a violent struggle took place on the back seat. According to the prosecution's evidence, the respondent produced a .38 automatic pistol and attempted to shoot Sergeant Li. Other police then arrived on the scene and eventually overpowered the respondent. The respondent was found to have in his jacket a .25 semi-automatic pistol and both pistols were loaded with live ammunition. There was some evidence that the .38 automatic revolver was the gun fired during the King Fook robbery, and that the .25 semi-automatic pistol was the gun fired during the Dickson robbery.

The respondent gave evidence. He denied possessing any firearms. He further denied that he was involved in either of the two robberies or that he knew the watches were stolen. He claimed that he was assisting the second defendant to dispose of the watches, which he believed were sub-standard watches produced in local factories. The second defendant gave evidence which materially implicated the respondent. He said that the respondent had offered to pay him a commission in return for finding a buyer for a quantity of smuggled watches.

The relevant statutory provisions.

The offence of "robbery" is defined in section 10 of the Theft Ordinance (Cap. 210):

> " 10(1) A person commits robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force.
>
> (2) Any person who commits robbery, or an assault with intent to rob, shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for life."

The offence of 'theft' is defined in section 2(1) of the Theft Ordinance and is punishable under section 9 of the Theft Ordinance:-

" 2(1) A person commits theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and 'thief' and 'steal' shall be construed accordingly."

Apart from the use of the word 'commits' instead of the words 'is guilty of', section 2(1) of the Theft Ordinance is in identical terms to section 1(1) of the English Theft Act 1968.

Paragraph 2 of the Schedule to the Theft Ordinance contains a list of alternative offences, of which a person charged with robbery, may be convicted. These include not only theft but handling stolen goods (section 24).

Section 32 of the Theft Ordinance provides:-

" 32(1) If on the trial of any information, charge or indictment for an offence specified in the first column of the Schedule it is proved that the accused is not guilty of that offence but guilty of one of the offences specified opposite thereto in the second column of that Schedule or of attempting or being a party to an offence so specified, the accused shall be acquitted of the offence originally charged and shall be convicted of such other offence or of attempting or being a party to such other offence and be liable to be punished accordingly."

The offence of 'handling' is defined in section 24 of the Theft Ordinance (in terms identical to section 22 of the English Theft Act 1968):-

" 24(1) A person handles stolen goods if (otherwise than in the course of the stealing) knowing or believing them to be stolen goods he dishonestly receives the goods, or dishonestly undertakes or assists in their retention, removal disposal or realization by or for the benefit of another person, or if he arranges to do so.

(2) Any person who handles stolen goods shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 14 years."

The trial judge's summing-up.

In an admirably clear summing-up, the trial judge explained to the jury *inter alia* the ingredients of the offence of robbery. He then summarised the evidence of the prosecution and explained that it sought to link the respondent with the two robberies, not only by reason of the fact that he was in possession of stolen property a comparatively short time after the robberies were committed, but

also by reason of the ballistic evidence, that each of the guns was used in one of the robberies. Having previously instructed the jury that in his view there was not sufficient evidence to connect the pistol, (Exhibit P4) to the second robbery, he then directed the jury as follows:-

> "If you disbelieved the first defendant's [the respondent's] account and you found the first defendant was in possession of the stolen watches on either the 20th of November or the 28th of December in the circumstances given in evidence and that he was also in possession of the revolver, exhibit P3, on the 28th of December in the circumstances given in evidence, you could infer from that that he committed both robberies ... If you were not satisfied that the guns had been linked to the robberies, you would be left with only comparatively recent possession of stolen property to connect the first defendant with the robberies. You would then have to ask yourselves whether, in view of the time lapse between the robberies and the date when he is proved to be in possession, whether you could be sure that the first defendant took part in these robberies."

He then gave them the appropriate direction with regard to the available alternative verdicts. He read out the provisions of section 32(1) of the Theft Ordinance, followed by section 24 of the Theft Ordinance. He then explained to them the ingredients of the offence of handling stolen goods under what he described as "the first part" of section 24 - the dishonest receiving of stolen goods. He further explained that when a group of robbers commit a robbery:-

> "... it is quite possible for goods to be handed from one thief to the other thief in the course of the robbery; and if one thief receives the goods from another, he is not guilty of handling stolen property, he is guilty of the actual theft because it was done in the course of the robbery. In order to be guilty of receiving, it must be other than in the course of the robbery."

If the judge had left the matter there, all would have been well. The judge had indicated very fairly that the essential evidence to link the respondent with the robberies depended on the ballistic evidence. If this did not satisfy them beyond reasonable doubt, then they should turn their attention to the alternative offences of handling. However, in anticipation that the jury might have some difficulty in deciding, assuming always that they rejected the respondent's evidence, between the offence of robbery/stealing and handling stolen goods, he read a passage from the judgment of the

Full Court of Hong Kong in the case of *Chan Tat and Another v. The Queen* (1973) H.K.L.R. 114 approving a passage appearing in an East African case *Andrea Obonyo v. R.* (1962) E.A.L.R. 542:-

> "When a person is charged with theft [and the judge told the jury that they could read for 'theft', 'robbery' because it includes 'theft'] and, in the alternative, with receiving, and the sole evidence connecting him with the offences is the recent possession of the stolen property, then, if the only reasonable inference is that he must have either stolen the property or received it knowing it to be stolen, he should be convicted either of theft or of receiving according to which is more probable or likely in the circumstances. He is not entitled to be acquitted altogether merely because there may be some doubt as to which of the two offences he has committed. That position is justified because the decision is not between guilt or innocence, but between whether he is guilty of theft or receiving, it having been proved that he is guilty of one or the other."

Before dealing with the origin and the validity of this direction, their Lordships should again emphasise this was not a case where the sole evidence connecting the respondent with the offences was that of recent possession of the stolen property. So far as the robberies were concerned the important evidence connecting the respondent with those offences was the ballistic evidence. Accordingly the nature of the problem confronting the jury was not that predicated in the direction.

The origin of the direction is said to be found in a case decided over a hundred years ago - *R. v. James Langmead* (1864) Leigh & Cave 427, 169 E.R. 1459. The defendant was indicted and tried at Devon Quarter Sessions on two counts, the first count for stealing and the second count for feloniously receiving a number of sheep, the property of Mr. Glanfield, a neighbouring farmer of the Parish of Belstone, some twenty two miles distance from Exeter. Mr. Glanfield had last seen the sheep on Belstone common about a fortnight before Christmas. On 22nd December Mr. William Smith, a cattle dealer, received a letter from the defendant offering to sell him some sheep. The letter informed Mr. Smith that the defendant would be at Little St. John's Cross at the King William Inn about a mile away from Exeter. On the evening of 23rd December Mr. Smith met the defendant at the Inn and the defendant sold him a number of sheep, including those belonging to Mr. Glanfield. At the close of the evidence for the prosecution, the defendant's counsel submitted to the Court that there was not sufficient evidence to go to the jury. This

submission was not accepted and the jury found the defendant guilty of feloniously receiving the sheep knowing them to be stolen. Following upon that verdict, counsel objected that there was no evidence before the Court to support the second count, and that the jury should have been directed that they could not find him guilty because, so he contended:-

> "The evidence proved no more than recent possession by the prisoner after the loss, unaccounted for, and that, although a presumption of guilt might legally be inferred from recent possession, unaccounted for, alone, if the offence of which the jury found the prisoner guilty had been theft, yet that guilt could not be inferred from recent possession, unaccounted for, alone, in considering whether the prisoner was guilty of feloniously receiving the sheep knowing them to have been stolen."

The Court was of the opinion that there was sufficient evidence to support the verdict but at the request of the defendant's counsel they granted a case on the following question:-

> "Whether, upon the whole case, the jury should have been directed that they could not lawfully find the prisoner guilty upon the second count."

In his submissions to the Court for Crown Cases Reserved, the defendant's counsel contended that the evidence established that it would have been impossible for either the defendant or his sons to have stolen the sheep and therefore the prisoner should have been acquitted, for recent possession is evidence of stealing only and not of receiving. This submission was rejected. Pollock C.B. said:-

> "We are all satisfied that the Chairman could not have withdrawn this case from the consideration of the jury or have directed them that there was no evidence that the prisoner had received the sheep knowing them to have been stolen. Speaking for myself, I may add, that in my opinion, the distinction taken by Mr. Carter between a charge of stealing and one of receiving, with reference to the effect of evidence of recent possession, is not the law of England. If no other person is involved in the transaction forming the subject of the enquiry, and the whole of the case against the prisoner is that he was found in possession of the stolen property, the evidence would, no doubt, point to a case of stealing rather than a case of receiving; but in every case, except, indeed, where the possession is so recent that it is impossible for anyone else to have committed the theft, it becomes a mere question for the jury whether the person found in possession of the stolen property stole it himself or received it from someone else."

Martin B. agreed and in his judgment Byles J. said:-

> "If the question was whether the verdict was right, there would be much force in many of Mr. Carter's observations; but the point we have to decide is whether there was any evidence to go to the jury."

Blackburn J. in his judgment rejected the submission made by Mr. Carter observing:-

> "I do not agree ... that recent possession is not as vehement evidence of receiving as of stealing. When it has been shown that the property has been stolen, and has been found recently after its loss in the possession of the prisoner, he is called upon to account for having it, and, on his failing to do so, the jury may very well infer that his possession was dishonest, and that he was either the thief or the receiver according to the circumstances."

Mellor J. in concurring, said:-

> "It is clear, that, whatever was the mode in which the jury in this case arrived at their verdict, there was evidence from which they might safely have drawn either conclusion."

In the course of giving their judgments a number of the judges expressed their opinions as to how the jury might have reached their verdict. Pollock C.B., said:-

> "If, as I have said, there is no other evidence, the jury will probably consider with reason that the prisoner stole the property; but, if there is other evidence which is consistent either with his having stolen the property, or with his having received it from someone else, it will be for the jury to say which appears to them to be the more probable solution."

He then observed that although there was some evidence that the accused had stolen the sheep, yet the inference that he had sent his sons to drive the sheep to St. John's Cross, having received them from someone who had stolen them, appeared to him to be the more cogent, adding - "however this may have been, we are all of the opinion that there was evidence to go to the jury". Martin B. commented:-

> "In cases of this nature it often happens that some of the jurors feel doubts, and think they ought not to convict the prisoner of stealing unless someone has actually seen him taking the property, and so they concur in convicting him of receiving, supposing that that is the more lenient view."

Byles J. stated that in his opinion there were three ways, which he described, in which the accused might have received the sheep with guilty knowledge. Blackburn J., in analysing the facts, also expressed the view that it was more probable that the sheep had been stolen previously by some other person and driven to some place near Exeter, where they were picked up by the boys. He added:-

> "If that were so, the inference would be irresistible that the person from whom the boys received them was the actual thief. Then, that being so, the father was, no doubt, an accessory before the fact, and there was, therefore, evidence for the jury on which they might convict him of receiving."

In speculating as to how the jury might have arrived at their verdict, the judges were in no manner suggesting that a judge, in his summing-up, should direct the jury that, where a person is charged with theft and in the alternative with receiving, and the evidence (or the sole evidence) connecting him with the offence is the recent possession of the stolen property, then if the only reasonable inference is that he must have either stolen the property or received it knowing it to be stolen, they should ask themselves which is the more probable offence and convict accordingly. There is no reflection of such a rule in English authorities and *Langmead* has not been cited in any English judgments for such a proposition. Their Lordships are firmly of the opinion that not only was such a direction quite uncalled for in this case for the reasons already given but that such a direction is wrong in law. It detracts, or may be thought to detract, from the obligation of the jury to be satisfied beyond reasonable doubt that the accused is guilty of the particular offence, before they enter such a verdict.

In their Lordships' opinion the trial judge, but for the injection into his summing-up of the passage quoted above from the case of *Chan Tat*, directed the jury quite properly as to the way in which they should approach a count of robbery and the alternative offence of handling. The jury were required to approach the matter by two stages. First, they had to ask themselves whether they were satisfied beyond reasonable doubt that the respondent was guilty of robbery. This would involve rejecting the defendant's evidence and then being satisfied, so that they felt sure, that the ballistic evidence linked the respondent with the robberies or either of them. If they were not so satisfied, they would then proceed to the second stage, and ask themselves whether the prosecution had satisfied them in relation to each of the ingredients of the

alternative offences of handling, which the judge had spelt out with great clarity. Of course, if less than a majority were in favour of convictions of robbery and less than a majority in favour of convictions of handling, then the judge would have to discharge the jury and order a new trial. This case gave rise to no special difficulty or complication.

The alleged further misdirection.

Their Lordships accordingly agree with the Court of Appeal that the judge materially misdirected the jury in the respects referred to above. However, the Court of Appeal added a further criticism. Li V.-P., in giving the judgment of the court said:-

> "We are satisfied, that in order to convict on handling, which it is not necessary for the Crown to prove beyond reasonable doubt that the accused is not involved in a robbery, the Crown is under an obligation to prove beyond reasonable doubt that the receiving took place otherwise than in the course of the robbery."

This has been interpreted as meaning that the phrase in parenthesis in section 24(1) of the Theft Ordinance "(otherwise than in the course of the stealing)" is an ingredient of the offence of handling and has to be the subject matter of a special direction. Thus, it was contended, it was necessary for the trial judge specifically to direct the jury that they must be satisfied beyond reasonable doubt that the accused did not receive the goods in the course of the robbery, before they could convict him of the alternative offence of handling stolen goods.

Mr. Desmond Keane Q.C., for the respondent, frankly accepted that he was, in substance, repeating a submission that he had unsuccessfully made to the Court of Appeal (Criminal Division) some 13 years ago in *R. v. Griffiths* [1974] 60 Cr.App.R. 14. In that case the appellant was convicted of handling a pair of stolen candlesticks. James L.J. delivering the judgment of the court, made this observation at pp. 15, 16:-

> "There was no evidence tending to show that the appellant was the thief. It was not suggested to or by any witness, including the appellant, that the appellant was the thief or that the candlesticks were in his possession, to use the words of section 22(1) of the Theft Act, 'in the course of the stealing' ...
>
> The recorder directed the jury in terms which made no reference to 'otherwise than in the course of the stealing' in relation to the ingredients of the offence charged. He did not

> give the direction which Mr. Keane has argued should have been given. In the judgment of this court the Recorder was absolutely right to deal with this aspect of the case as he did. There was no issue as to whether the receipt of the candlesticks was otherwise than in the course of the stealing. In a case in which there is, on the evidence, an issue as to whether the receipt of stolen goods was in the course of the stealing or otherwise, a direction would be necessary. To give such a direction in this case, in which there was no issue to which counsel's submission could relate, would have been both confusing and wrong."

In the recent case of *R. v. Cash* [1985] 1 Q.B. 801, Lord Lane C.J. giving the judgment of the Court of Appeal (Criminal Division) quoted with approval, the extract from the judgment in *R. v. Griffiths* set out above. Once more, the Court of Appeal (Criminal Division) had to deal with the proposition that the words "otherwise than in the course of the stealing" obliged the prosecution to prove affirmatively that the defendant was not the thief or a party to the theft. If that was not proved, so it was contended, the charge of handling was not made out, because the words constitute an essential ingredient of the offence of handling, thereby placing a burden upon the prosecution to prove this negative averment. This proposition was rejected, Lord Lane C.J. giving the judgment of the Court, observing at page 804H, that if there were to be placed upon the prosecution the burden which counsel for the appellant had suggested, the object of the so called doctrine of recent possession would be defeated. The inference which a jury are in a proper case entitled to draw, namely, that the defendant was the guilty handler, includes the inference that he was not the actual thief.

Of course, in the cases of *Griffiths* and *Cash*, there were no counts of stealing. Accordingly, there was no issue as to whether the receipt of the stolen goods was in the course of the stealing. No suggestion was made that the appellants were the thieves or that the property came into their possession in the course of stealing. Indeed in *Cash*'s case Lord Lane C.J. observed:-

> "Furthermore, when he [Cash] went into the dock, there was a presumption that he was innocent of any charge of burglary as well as of handling. There was no evidence to displace that presumption so far as burglary was concerned. The presumption was displaced by evidence so far as dishonest handling was concerned. If, therefore, there was no evidence that the appellant was the burglar or had taken part in

> the burglary, the jury, as a matter of logic and common sense, were entitled to find that his handling which was not in dispute was a handling otherwise than in the course of the stealing."

In this case, the result of the jury acquitting the respondent of the robberies was to make the issue of whether or not he was the thief of the watches and the other goods no longer a live issue. The presumption that he was innocent of the theft of the goods, which existed when he went into the dock, was thus never rebutted. Accordingly, there was no necessity for the judge to make any but a passing reference to the parenthesis. It called for no specific direction.

The proviso.

As previously stated, the Court of Appeal ordered a new trial. Before their Lordships it was urged that the proviso to section 83(1) of the Criminal Procedure Ordinance (Cap 221) should be applied and notwithstanding the material misdirection, referred to earlier in this judgment, the appeal against the convictions should have been dismissed. The terms of the proviso, which are identical to the proviso to section 2(1) of the English Criminal Appeal Act 1968, read as follows:-

> " 83(1) Except as provided by this Ordinance, the Court of Appeal shall allow an appeal against conviction if it thinks -
>
> (a) ...
>
> (b) ...
>
> (c) that there was a material irregularity in the course of the trial,
>
> and in any other case shall dismiss the appeal:
>
> Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no miscarriage of justice has actually occurred."

After the jury had retired for a period of 3½ hours they sent a note to the judge in these terms:-

> "We require a redirection from the judge of the law relating to the lesser charge after the first accused has been found not guilty of robbery."

The trial judge then gave an impeccable direction, save that he erred in the respondent's favour by directing the jury that the prosecution was required

to establish what he referred to as the "fifth ingredient", namely that the accused received the goods otherwise than in the course of the stealing. At the end of that direction he inquired of the foreman "Can you give any indication as to how much longer you think you would be likely to be?" The foreman's answer was "very quickly". Having regard to the terms of foreman's note quoted above and his answer to the judge's question, it is apparent to their Lordships that the jury had decided to acquit the respondent of the robbery charges, before seeking and obtaining the further direction. Since that further direction did not repeat the so called "choice" direction, their Lordships are satisfied that, the jury having clearly rejected the respondent's account, the only reasonable and proper verdict was that the respondent was guilty of handling. If the jury had not received the misdirection, they would inevitably have come to the same conclusion.

Their Lordships will therefore humbly advise Her Majesty that this appeal should be allowed, the order of the Court of Appeal set aside and the convictions restored.