

HER MAJESTY THE QUEENAPPELLANT;

1955

*Nov. 28

AND

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KENNETH SUCHARDRESPONDENT.

*Mar. 28

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Theft—Receiving—Retaining—Whether doctrine of recent possession of stolen goods applies to offence of retaining.

The respondent was tried on three charges, (1) theft of goods, (2) receiving the goods knowing them to have been stolen and (3) retaining the same knowing them to have been stolen. The trial judge acquitted him on the charges of theft and receiving and convicted him of retaining. The Court of Appeal quashed the conviction and ordered an acquittal.

Held: The appeal should be dismissed.

The presumption of recent possession does not apply to the offence of retaining. Guilty knowledge must be acquired subsequent to the original obtaining of possession. In the present case, there was no evidence that the respondent had acquired, after the goods had come into his possession, knowledge that they had been stolen.

APPEAL by the Crown from the judgment of the Court of Appeal for Ontario (1), quashing the respondent's conviction on a charge of retaining and ordering his acquittal.

C. P. Hope, Q.C. for the appellant.

A. Cooper for the respondent.

THE CHIEF JUSTICE:—A majority of the Members of the Court which heard this appeal are of the view that the offence of retaining stolen goods knowing them to have been stolen is a separate and distinct offence from that of receiving. In *Clay v. The King* (1), I adopted as correct the statement of Roach J.A., when that matter was before the Court of Appeal, that on a charge of retaining goods which had been stolen knowing them to have been stolen, the presumption in the case of recent possession arose if at the time of receiving the accused knew that the goods had been stolen; that that presumption of knowledge continued down through the period in relation to which the accused was charged with retaining. In the *Clay* case that was also the view of Chief Justice Rinfret, Taschereau J. and

*PRESENT: Kerwin C.J., Taschereau, Rand, Kellock, Locke, Cartwright and Fauteux JJ.

(1) 111 C.C.C. 151. (1) [1952] 1 S.C.R. 170.

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Fauteux J. A careful examination of the reasons of Estey J. leads me to the conclusion that he considered that guilty knowledge must be acquired subsequent to the original obtaining of possession.

There was, therefore, no majority as to the basis for the application of the presumption. In view of the fact that four of the Members of the Court hearing this appeal held and hold the view indicated above, it should now be laid down that the presumption does not apply at all to the offence of retaining.

As to this particular case, there is a right of appeal as ground number two, upon which leave to appeal was granted, is a question of law, i.e., as to whether there was any evidence of subsequently acquired knowledge on the part of the respondent that the goods in his possession were stolen goods. In my view there was no evidence upon which the Magistrate could find that Suchard acquired, after the goods had come into his possession, knowledge that they had been stolen, and the appeal should be dismissed.

The judgment of Taschereau and Fauteux JJ. was delivered by:—

FAUTEUX J.:—The first ground upon which leave to appeal was granted is whether:

The Court of Appeal for Ontario erred in law in failing properly to apply the principle enunciated by the Supreme Court of Canada in the case of *Clay v. The King*.

Holding that receiving and retaining constitute two distinct criminal offences, Members of this Court divided in the *Clay* case (1), as to the feature of the distinction between the two.

On the view of a majority, the time at which the knowledge, that the property is stolen property, is acquired differentiates one offence from the other. If this guilty knowledge is coincident with the initial possession of the stolen property, the offence is receiving; if only subsequent thereto, it is retaining.

On the view of a minority, inception of the possession, in the case of receiving, and retention of the possession, in the case of retaining, manifest the only distinction between

the two offences. It matters not *since when*, in retaining, or *how long after*, in receiving, the guilty knowledge co-exists with the possession, provided it does so at the time of reception with respect to the latter offence, or at any time with respect to the former.

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Since and by this decision, the opinion of the majority has become the judgment of the Court on the matter.

On the basis of this now settled definition of retaining, no longer can the presumption of recent possession be effective to support a conviction of retaining. For, in its very nature, the presumption, resulting from the mere circumstance of recent possession of stolen goods, is that the initial possession was *gained* with the knowledge that the goods were stolen. The fact thus presumed—i.e. a guilty knowledge coincidental with initial possession—negatives the existence of an honest initial possession which is part of the essence of retaining and, hence, necessarily precludes a conviction for the latter offence. Furthermore, as under the definition of retaining, an honest initial possession is postulated, the presumption is also ineffective—as was held, in the *Clay* case, by those who expressed the view that the doctrine of recent possession was applicable to the offence of retaining as they then conceived it—to change it into a dishonest one.

In brief, and once the fact of recent possession of stolen goods is established, the fact that they were gained with the knowledge that they were stolen is immediately presumed; and while a conviction for theft or receiving may then be supported by this presumption, a conviction of retaining cannot. In the latter case, other evidence must be adduced and be, on the whole, more consistent with a guilty knowledge subsequent to the inception of the possession than, as presumed to be, in view of the fact of recent possession, coincident thereto.

The first ground of appeal is then well taken.

The second ground, upon which leave to appeal was granted, was whether:

The Court of Appeal for Ontario erred in finding that there was no evidence of subsequent acquired knowledge on the part of the respondent that the goods in his possession were stolen goods.

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That question implies, as it should, that the distinction, between the offence of receiving and the offence of retaining, made by the majority in the *Clay* case, is the proper one.

In the present case, and as against the respondent, there was evidence of recent possession and, hence, of dishonest initial possession; there was also evidence of conduct indicating that, since some time, he had a guilty knowledge that the rings were stolen property.

The conviction, however, was for retaining. On a careful consideration, it cannot be said that the whole of the evidence is more consistent with a guilty knowledge subsequent to initial possession than, as flowing from the presumption, coincident thereto.

On this second ground, I am in respectful agreement with the unanimous view of the Court of Appeal and would, therefore, dismiss the appeal.

The judgment of Rand, Kellock and Cartwright JJ. was delivered by:—

KELLOCK J.:—The respondent was charged, together with Joyce Hickey, Arthur Scott and John Jones, on three counts, (1) theft of certain rings, (2) receiving, and (3) retaining the same rings. The charges were tried in Magistrate's Court and were dismissed against Scott and Hickey, no evidence being offered as against the latter. The respondent and Jones were convicted of retaining and found not guilty of theft and receiving. On appeal by the respondent to the Court of Appeal (1), the conviction was quashed and a verdict of acquittal directed to be entered. The appeal to this court is by leave pursuant to the provisions of s. 1025 (2) of the *Criminal Code*.

The rings in question were proved to have been stolen from a retail store in Hamilton on the afternoon of Friday, August 6, 1954. On the evening of that day, the respondent, together with Jones, was in Windsor, where they met Hickey and one Reid, with whom she was living in Windsor. The four were together at times over the ensuing week-end.

On Monday, August 9, the four met by arrangement in a hotel at 2 p.m. Hickey testified that on this occasion

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Jones asked her if she had any idea where "they" could sell "some rings they brought up from Toronto". On Hickey stating that she might know some people she could introduce them to, "they" asked Reid if "they" could borrow the car and take her with them. The three then went to a club where Hickey introduced Jones and the respondent to some people who weren't interested. They then met Scott, who was told by Hickey that the two men were interested in selling rings and he was asked if he knew anyone who might want them. In the upshot, following a telephone call made by Scott, the four drove to a parking lot, where Jones handed the rings to Scott for the purpose of showing them presumably to the person to whom he had spoken. Ultimately, he returned and said that he was to telephone at six p.m.

The party got back into the car and started back for the hotel, Scott giving the rings back to Jones. During this drive, Scott was in the back seat, Jones drove the car with Hickey beside him, and Suchard was on the right-hand side of the front seat. During this drive they were intercepted by the police. When this occurred Jones handed the rings to Hickey, instructing her to hide them. She slipped them inside her blouse and later produced them to the police. When the car was stopped the respondent was asked to get out, and upon being searched, two ring boxes were found in his pocket. The rings themselves were identified by the Hamilton retailer, who also deposed that the boxes were of the type containing the rings at the time of the theft but it was not possible to identify them absolutely as the ribbon bearing the name of the retailer had been torn out in each case.

On the occasion when the theft occurred, a man had entered the store and handed the jeweller a bracelet type watch, asking him to tighten the clips. The jeweller had to go to his work bench at the back of the store for the necessary tools and he was followed there by the owner of the watch. Just as the jeweller got into the workshop, two more men entered the store. The jeweller tightened the clips as quickly as he could and handed the watch back to the owner, having to push him out of the way in order to get back into the store to attend to the other two.

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Immediately upon the three leaving the store, the jeweller noticed that two clocks had been taken from a shelf. He therefore checked his stock in a safe which had been open. This took some four or five hours. As a result of this checking, the rings were found to be missing and the police were notified. At the time of Jones' arrest, he was wearing a wrist-watch and bracelet of the type worn by the first man who had entered the store. On this evidence the magistrate disposed of the charges as above mentioned. In his view, the evidence established joint possession of the rings on the part of Jones and the respondent.

The judgment of the Court of Appeal was founded upon the view that there was no evidence pointing to guilty knowledge having been acquired by the respondent after he had received the goods. The court considered that while it has been established by the judgment of this court in *Clay v. The King* (1), that where the only evidence of guilty knowledge, including the inference arising from the fact of recent possession of stolen goods relates to the inception of the possession, an accused person cannot be convicted on a charge of retaining but only of receiving, the court considered that all of the evidence in the case at bar pointed only to knowledge at the time of receiving. The conviction was accordingly set aside.

In *Clay v. The King*, *ubi cit*, it was held by Rand, Kellock, Locke and Cartwright JJ., that the offences of receiving and retaining are separate and distinct and mutually exclusive, the difference between the two being that (p. 190) "in the case of the offence of retaining, there is an interval of time, however short, between the actual receipt of the goods and receipt of knowledge of their stolen character, during which interval the possession is either an honest possession or the character of this interval is not in question."

Estey J. was of the same opinion. At p. 208 he said:

Receiving and retaining, as already stated, . . . are separate and distinct offences and an accused, even when the evidence of guilty knowledge can be found only in the presumption, can only be found guilty of either theft or receiving, but not both. Upon the same basis an accused cannot be found guilty of receiving and retaining. If an accused party receives the guilty knowledge coincident with possession of the stolen property, he is guilty of the offence of receiving and not of retaining. If, however,

(1) [1952] 1 S.C.R. 170.

he receives the property and subsequently acquires knowledge that the property was stolen, and thereafter continues to retain same, he is guilty of the offence of retaining.

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With regard to the doctrine of recent possession, it was held by Rand, Kellock, Locke and Cartwright JJ. that it did not apply to the offence of retaining. The judgment of Taschereau and Fauteux JJ., *contra*, was founded on the view that the offence of retaining was to be defined as being in possession of goods having acquired knowledge of their stolen character at any time during the possession, including the time of the actual receipt of the goods.

While at one point in his reasons Estey J. said, at p. 208, that "the presumption of recent possession applies to all three of these offences", the learned judge, in dealing with the facts before the court, said, at p. 209:

The explanation here given related to the initial reception of the stolen property and was disbelieved by the learned trial judge . . . *There was no evidence* that justified the conclusion that he received the goods without knowledge of their having been stolen and subsequently acquired such knowledge and thereafter continued to retain the same.

If the earlier statement of the learned judge that the presumption of recent possession really applied to the offence of retaining, then the explanation of possession given by the accused having related only to the initial reception, the presumption still applied to the offence of retaining, as to which no explanation had been given. Estey J. found, however, that there "*was no evidence* that justified the conclusion that he received the goods without knowledge of their having been stolen and subsequently acquired such knowledge and thereafter continued to retain same," a finding which he could not have made if the presumption applied to the charge of retaining.

That this is the true view of the ground upon which the learned judge proceeded is confirmed by the last sentence of his reasons at p. 210:

The evidence does not support a conviction of retaining, as that offence is constituted under s. 399.

This is in accord with the actual judgment of the court in the case of *Clay* as it set aside the conviction on "the charge of retaining.

In the case at bar, therefore, the appellant, having been acquitted of the offences of theft and receiving, the only

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question is whether there was any evidence upon which the magistrate was justified in finding knowledge subsequently acquired. In the opinion of the court appealed from, all of the evidence was consistent only with guilty knowledge at the inception of possession.

Where the evidence indicating knowledge other than that afforded by the presumption is not sufficient to show knowledge at all, the Crown is confined to the presumption which relates only to the charge of receiving. In reaching the conclusion that there is knowledge where there is evidence apart from the presumption, the tribunal is not bound to act upon the presumption. The time when such knowledge came to the accused may be uncertain, and then it is a matter for the first tribunal to decide the greater probability of its having been acquired when receiving the property or later. There may be doubt of the former, and in that case the tribunal may find that it was subsequent, and convict on the count of retaining. If it is once shown that knowledge has co-existed with possession, then obviously that coincidence must have arisen either at the moment of receiving the goods or thereafter; it is necessarily the one or the other; and its attribution to one period automatically concludes the charge based on the other.

The presumption is merely an inference of fact which has become crystallized into a rule of law. The doctrine arose out of the practical necessities of the enforcement of the law against theft and the allied offence of receiving and other offences which are incident or connected. It is a device available to the Crown, and by means of it, the burden of furnishing an explanation for the possession is cast upon the accused.

This being the nature of the presumption, it is obviously not open to the accused in any case to demand its application formally to one or other count against him; *Reg. v. Langmead* (1), per Blackburn J. The prosecution may or may not rely upon it. All that is open to the accused is to meet it with an explanation or resist its application, not require it to be applied for his own purposes.

In *Clay's* case, the evidence, apart from the presumption, from which a conclusion of knowledge could have been drawn was of such facts as necessarily involved knowledge,

(1) 1 Le. & Ca. 427 at 437.

if at all, at the time of receiving the goods. Accordingly, the acquittal upon the charge of receiving necessarily entailed a finding that those facts did not give rise to a conclusion of knowledge. In that event they could not thereafter be made use of for the purposes of a conviction for retaining.

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In the case at bar I am not prepared to differ from the view of the Court of Appeal as to the import of the evidence.

I would dismiss the appeal.

LOCKE J.:—I have had the advantage of reading the reasons for judgment to be delivered in this matter by my brother Kellock and I agree with his statement as to the matter decided by the judgment of this Court in *Clay v. The King* (1).

The learned Chief Justice of Ontario, in delivering the unanimous judgment of the Court of Appeal, has found that there was no evidence adduced at the hearing pointing to guilty knowledge being acquired by the respondent after the time of receiving. With this I respectfully agree and would accordingly dismiss this appeal.

Appeal dismissed.

Solicitor for the appellant: *W. C. Bowman.*

Solicitor for the respondent: *A. M. Cooper.*

*PRESENT: Kerwin C.J., Kellock, Locke, Cartwright and Fauteux JJ.