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*Feb. 13
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WILFRED BOSS ..... APPELLANT;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

EDWARD KLINE ..... APPELLANT;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

LEO ARSENAULT ..... APPELLANT;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA, IN BANCO

Criminal law—Theft of case of cigarettes—Accused peddling cigarettes—Circumstantial evidence—Misdirection as to rule in Hodge's case—Suspicion—Doctrine of recent possession—Criminal Code, 1953-54 (Can.), c. 51, s. 296.

*PRESENT: Kerwin C.J. and Locke, Cartwright, Judson and Ritchie JJ.

A wholesale store in Truro, N.S., was broken into on the night of January 24, 1960, and nine cases of cigarettes were reported missing. The three accused were charged and tried separately by the same magistrate for unlawfully possessing a quantity of cigarettes, knowing that they were obtained by the commission of an indictable offence, contrary to s. 296(a) of the *Criminal Code*. The evidence disclosed that they were trying to dispose of a case containing 49 cartons of cigarettes of an unidentified brand in a neighbourhood town on the day following the break-in, and that they were travelling in a two-tone 1956 Buick convertible, with Ontario licence plates. A two-tone car, with Ontario licence plates, containing two occupants whom the police could not identify, had been seen in the area near the store on the evening of January 24. The evidence of the police was that all the nine cases were returned; the owner's evidence was that eight cases were recovered and that the missing case contained Player's Cigarettes. Accused B and K stated that they never had any cigarettes in their possession, but that they were endeavouring to dispose of some on behalf of another person. The magistrate convicted the accused, basing his reasoning on the express finding that the cigarettes they were trying to sell had been stolen by them from the wholesale store. The convictions were affirmed by the Supreme Court of Nova Scotia, *in banco*. The accused were granted leave to appeal to this Court upon certain questions of law.

Held: The appeals should be allowed, the convictions quashed and the accused acquitted.

There was no direct evidence that the cigarettes were in the possession of anyone other than the true owners. There was, however, no doubt that the three accused were attempting to dispose of cartons of unidentified cigarettes. This was a circumstance to be weighed by the magistrate, together with the other circumstances disclosed by the evidence in accordance with the rule in *Hodge's* case. The magistrate had misdirected himself in applying this rule. The evidence of any cigarettes having been stolen at all was at best equivocal, and there was no evidence of the kind of cigarettes tendered for sale by the accused. Furthermore, there was no evidence that the accused B or A were in that area on the previous night. It was undoubtedly suspicious to find these men driving a two-tone 1956 Buick with Ontario licence plates and peddling cigarettes, but suspicion is not a substitute for proof and the convictions on circumstantial evidence appeared to be based upon a misconception of the rule in *Hodge's* case. The magistrate had erred in proceeding on the assumption that the accused had admitted having been in the area together on the night of the break-in. The doctrine of recent possession could not apply to the case, since the magistrate had based his decision on the express finding that the accused had themselves stolen the cigarettes in question. The further submission that the appeals should be dismissed because no substantial wrong or miscarriage of justice had occurred, failed for lack of evidence.

APPEALS from a judgment of the Supreme Court of Nova Scotia *in banco*, affirming the accused convictions. Appeals allowed.

L. L. Pace and *Chas. W. MacIntosh*, for the appellants.

Malachi C. Jones, for the respondent.

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The judgment of the Court was delivered by

RITCHIE J.:—These three appeals were heard together. The three appellants were charged and tried separately by the same Magistrate for unlawfully having in possession at or near Amherst, Nova Scotia, on January 25, 1960,

> . . . a quantity of cigarettes, the property of Truro Wholesalers Limited, knowing that it was obtained by the commission of an offence punishable by indictment contrary to s. 296(a) of the Criminal Code.

The evidence taken against Boss was used by consent in the other two cases, and the evidence given by Kline in his own defence was similarly used in the case of Arsenault.

In each case the evidence discloses that these three men were trying to dispose of a case containing 49 cartons of cigarettes of an unidentified brand at Amherst on the 25th of January, and that they were then travelling in a two-tone 1956 Buick convertible with Ontario license plates, but the evidence does not indicate that cigarettes were found in the possession of any of the appellants, and it is stated by both Boss and Kline that they had never had any cigarettes in their possession but that they were endeavouring to dispose of some on behalf of another person.

Coupled with this evidence is the fact that on the morning of January 25 the secretary-treasurer of Truro Wholesalers Limited found that his store had been broken into, and that, as far as he could tell from his records, one full case containing 50 cartons of cigarettes was missing and that marks in the snow which had fallen during the night before indicated that a case of Player's cigarettes had been put out and taken away. In this latter regard the same secretary-treasurer states that there were originally nine cases missing of which eight were recovered, whereas the police officer concerned swears that nine cases were returned to Truro Wholesalers Limited.

The other circumstance strongly relied upon by the Crown was the fact that an Ontario two-tone 1956 convertible Buick containing two occupants whom the police could not identify was seen in Truro near Truro Wholesalers Limited on the evening of January 24.

In a statement made to the police which was produced at his trial, Boss said that he had been in Truro with the other two appellants on the 25th of January, but denied knowing about the break, and Kline, giving evidence at his own trial, stated that he was in Truro on the evening of the 24th in a two-tone 1956 Buick convertible of a different shade from that described by the two police officers, but did not name either of the other appellants as his companion.

In convicting each of the appellants it is quite apparent that the learned Magistrate based his reasoning on the express finding that the cigarettes which these men were trying to sell in Amherst on the 25th of January had been stolen by them from Truro Wholesalers Limited. He says, in convicting Boss, "I have to find that these fellows stole them in order to convict them", and in convicting the other two appellants, "In this case I am well satisfied that they not only had possession of them but that they are the thieves".

In appealing from these convictions to the Supreme Court of Nova Scotia *en banc,* each of the appellants gave notice of appeal on the following, amongst other, grounds:

1. There was not sufficient evidence presented at the trial to prove beyond reasonable doubt that the accused was guilty of the offence charged.
2. The learned Magistrate did not give the accused the benefit of reasonable doubt as to his guilt.
3. The learned Magistrate failed to comprehend or to apply the rules of law applicable to circumstantial evidence.
4. The conviction is against the weight of evidence and the proper application of the evidence.

The decision of the Supreme Court *en banc* was rendered by Ilsley C. J. who found:

1. THAT there was evidence in the proceedings against Boss (admissible only against Boss) on which the learned Magistrate could properly find, as he did, that Boss jointly participated with Kline in the theft of a case of cigarettes at Truro from Truro Wholesalers Limited;
2. THAT in the proceedings against Kline there was evidence (admissible only against Kline) that Kline jointly participated with Boss in the same theft;

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3. THAT there was evidence in each of the three cases that later, in Amherst, each of the three appellants had, jointly with the others, possession of or control over this case of cigarettes less one carton, or aided in concealing or disposing of it;
4. THAT at that time Boss and Kline must, of course, each have known that the cigarettes had been stolen;
5. THAT the evidence in the proceedings against Arsenault was sufficient to justify the Magistrate in properly inferring that Arsenault also knew that they had been stolen; and
6. THAT each of the explanations given by Boss and Kline was one which the Magistrate was quite justified in finding not to be an explanation that could reasonably be true.

From this judgment the appellants sought leave to appeal to this Court, and by Order dated December 19, 1960, leave was granted upon the following questions of law:

1. Did the Supreme Court of Nova Scotia en banc err in failing to hold that the learned magistrate misdirected himself on the law in his application of the rule relating to circumstantial evidence known as the rule in Hodge's case?
2. Did the Supreme Court of Nova Scotia en banc err in failing to hold that there was no evidence against the appellants to sustain a conviction?
3. Did the Supreme Court of Nova Scotia en banc err in failing to hold that the learned magistrate misdirected himself as to the doctrine of recent possession of stolen goods?
4. Did the Supreme Court of Nova Scotia en banc err in failing to hold that the learned magistrate misdirected himself as to the doctrine of reasonable doubt?

The offence here charged is complete when a person has (alone or with another person) possession of or control over goods which he knows to have been obtained by the commission of an indictable offence or when he aids in concealing or disposing of such goods (see s. 300 of the *Criminal Code*).

In the present case, while there is no direct evidence of "a quantity of cigarettes, the property of Truro Wholesalers Limited", being in the possession of anyone other than the true owner, there is no doubt that the three appellants were attempting to dispose of 49 cartons of unidentified cigarettes in Amherst on January 25. This was a circumstance to be weighed by the Magistrate, together with the other circumstances disclosed by the evidence in accordance with the rule of law which has come to be known as

the rule in *Hodge's* case[1] and which was expressed by Sir Lyman Duff, speaking on behalf of this Court in *The King v. Comba*[2], where he said:

> It is admitted by the Crown, as the fact is, that the verdict rests solely upon a basis of circumstantial evidence. In such cases, by the long settled rule of the common law, which is the rule of law in Canada, the jury, before finding a prisoner guilty upon such evidence, must be satisfied not only that the circumstances are consistent with a conclusion that the criminal act was committed by the accused, but also that the facts are such as to be inconsistent with any other rational conclusion than that the accused is the guilty person.

To this statement there should be added what was said by Cartwright J. in *Lizotte v. The King*[3], as follows:

> *Hodge's* case was a case where all the evidence against the accused was circumstantial. It is argued that the direction there prescribed is not necessary in a case where there is direct evidence against the accused as well as circumstantial evidence. However that may be, it is my opinion that where the proof of any essential ingredient of the offence charged depends upon circumstantial evidence it is necessary that the direction be given.

In the course of his reasons in the case of Boss which he applied to the other two cases, the learned Magistrate is reported, according to the record before this Court, as having stated the rule in the following language:

> If they (the Crown) had to prove they were stolen and these people knew they were stolen, there would be no sense in rule in Hodge's case. The rule in Hodge's case is the rule that circumstantial evidence, if no other reasonable explanation they are in their possession, then they are guilty.

If the learned Magistrate was correctly reported, as we must take him to have been, he misdirected himself in this regard, but it is not so much the language which he is reported to have used as the manner in which he applied the rule which is of importance in determining the disposition of these appeals.

It is an essential ingredient of the offences charged that it should at least be proved that cigarettes were missing from Truro Wholesalers Limited, and as to this phase of the matter the opening words of the learned Magistrate's reasons for judgment are significant. He there says:

> I must say there is a bit of doubt as to whether any cigarettes were missing at all. According to the evidence as far as Nichols (Secretary-Treasurer of Truro Wholesalers Limited) is concerned he said according to his records it looked as though there were nine cases of cigarettes missing and they recovered eight. I think the Detective said they recovered nine.

[1] (1838), 2 Lew. C.C. 227, 168 E.R. 1136.
[2] [1938] S.C.R. 396 at 397, 3 D.L.R. 719.
[3] [1951] S.C.R. 115 at 133, 11 C.R. 357, 99 C.C.C. 113, 2 D.L.R. 754.

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The secretary-treasurer stated that as far as he could tell there was one full case missing, and when asked to explain this statement he said:

> We keep a record of our stock, sir, and as far as we could tell from our records there was one full case missing and evidence of one case being put over a fence. The mark of the imprint was there in the snow. Therefore, that case would have to be put down in the snow and taken away by some one.

The evidence of any cigarettes having been stolen at all is, therefore, at best equivocal, and although the secretary-treasurer adds that as far as he could tell the imprint in the snow was that of a case of Player's cigarettes, there is no evidence whatever of the kind of cigarettes tendered for sale in Amherst. There is no evidence that either Boss or Arsenault were in Truro on the night of the 24th of January, the police were unable to identify any of the appellants as the men seen in the Buick near Truro Wholesalers Limited that evening, and Kline says that the Buick he was in that night was a different colour from that described by the police.

It was undoubtedly suspicious to find these men driving a two-tone 1956 Buick with Ontario license plates and peddling cigarettes in Amherst the day after a break into premises at Truro from which cigarettes were thought to have been missing and outside of which a similar car had been seen on the night of the break, but suspicion is not a substitute for proof, and insofar as these convictions rest upon circumstantial evidence, they appear to me to be based in large measure on the misconception of the rule in *Hodge's* case to which reference has been made. In my opinion, if the learned Magistrate had properly directed himself as to the law in his application of the rule in *Hodge's* case to the circumstances here disclosed, he would have concluded that there was no evidence to sustain a conviction against these appellants.

It should be pointed out, however, that the Magistrate appears to have proceeded on the assumption that the appellants admitted having been in Truro together on the night of the break. In this he was in error.

As the learned Magistrate based his decision on the express finding that the appellants had themselves stolen the cigarettes in question, there was no room for the

application of the "doctrine of recent possession" which is directed to the question of whether or not an accused who is found to be in possession of goods recently stolen is aware of the fact that they are stolen goods nor indeed is there any occasion to invoke this doctrine on the view which I take of these cases because, as I have indicated, I do not consider that the evidence is of a kind upon which it is safe to base a finding that there were cigarettes missing from Truro Wholesalers Limited.

It is argued on behalf of the respondent that notwithstanding the errors in law which there may have been in the trial of these cases, the appeals should nevertheless be dismissed on the ground that no substantial wrong or miscarriage of justice has occurred. The test to be applied to this argument is to be found in the decision of Viscount Simon in *Stirland v. Director of Public Prosecutions*[1], the following portion of which was adopted by this Court in *Schmidt v. The King*[2]:

> . . . the provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would on the evidence properly admissible, without doubt convict.

I am of opinion, with the greatest respect, that there was no evidence upon which the learned Magistrate could properly find that Boss and Kline jointly participated in the theft of this case of cigarettes or that the appellants had possession of it or aided in concealing or disposing of it with knowledge that it had been stolen.

The judgment of this Court has already been rendered allowing these appeals, quashing the convictions and directing verdicts of acquittal to be entered.

Appeals allowed, convictions quashed and verdicts of acquittal ordered.

Solicitor for the appellants: L. L. Pace, Halifax.

Solicitor for the respondent: M. C. Jones, Halifax.

[1] [1944] A.C. 315, 113 L.J.K.B. 394, 2 All E.R. 13.
[2] [1945] S.C.R. 438 at 440, 83 C.C.C. 207, 2 D.L.R. 598.