2000/28

18 pages

Court of Appeal

Decision given, with reasoned Judgment to follow: 17th December, 1999.
Reasoned Judgment: 17th February, 2000; and read on behalf of Nutting JA, by the President, using video conferencing facility, on 20th March, 2000.

Before: R.C .Southwell, Esq., Q.C., President,
Sir John Nutting, Bt., Q.C.; and
P.D. Smith, Esq., Q.C.,

Richard Edward Manning
-v-
Her Majesty's Attorney General.

Application of RICHARD EDWARD MANNING for leave to appeal against his **conviction** on 8th September, 1999, at a Criminal Assize, following a not guilty plea to:

1 count of receiving, hiding, or withholding stolen property: count 2, on which count a 2 year binding over was made on 25th October, 1999, and against which there is no appeal.

[The Appellant was acquitted on 8th September, 1999, on count 1 of the indictment laid against him, a further count of receiving, hiding, or withholding stolen property].

Advocate C.J. Scholefield for the Appellant;
A.D. Robinson, Esq., Crown Advocate.

JUDGMENT

THE PRESIDENT: This is the first judgment of the Court of Appeal to be delivered by means of the teleconferencing facilities in Morier House, and at the Bar Council of England and Wales. The judgment I am about to read is the judgment of the Court, which has been prepared by Sir John Nutting JA.

This Appellant appeared before the Royal Court on 6th September 1999 to answer an indictment containing two counts. In the first count he was charged with receiving, hiding, or withholding silver to the value of just over £1,000 belonging to a Mrs Germain and a Miss Stievenard. In the second count he was charged with the same offence in relation to silver valued at just under £2,000 belonging to a Mr Dangerfield.

He pleaded not guilty and was tried before the Deputy Bailiff and an Assize Jury. After a trial lasting four days he was acquitted on the first count but convicted on the second. Sentence was adjourned until 25th October 1999 on which date the Appellant, who had been of good character hitherto, was ordered to be bound over to be of good conduct for a period of two years.

On 5th November 1999 he filed notice of his intention to appeal against his conviction. There was insufficient time for the application to be considered by a single Judge and so his case came before this court as an application for leave to appeal on 13th

December 1999. We granted leave at the outset of the hearing and indicated that we intended to treat his application as a full hearing of the appeal. On 14th December 1999 we allowed the appeal and ordered that the conviction be set aside and the sentence quashed. We now give our reasons for that decision.

Advocate Scholefield who appeared both before us and below, advanced a number of grounds in support of his argument on appeal. In view of the decision which we reached in relation to the most significant of his grounds, we have found it unnecessary to reach a view on the subsidiary matters and confine this judgment to the ground relating to the admission of certain evidence on the basis of the common law principle stated by the English Court of Appeal in R -v- Powell (1909) 3 Cr.App.R. 1.

The Indictment

The Appellant was originally charged in an indictment containing 15 counts, involving four defendants including himself. His co-accused included two men, Jacob Corvel and Mark Miller, who during the autumn of 1998 committed a large number of burglaries on this island. Both men pleaded guilty and gave evidence at the Appellant's trial. The third defendant, Peter Louis, the brother of Jacob Corvel, was, like the Appellant, charged with receiving property stolen in burglaries committed by his brother and Miller. The Appellant was tried alone and the counts against him were charged in a renumbered indictment containing the two counts referred to above.

The Facts

The circumstances which resulted in the Appellant's arrest arose out of information provided to the police that he was in possession of stolen property. Police arrived at his house at Le Fliquet Bay shortly after 10.00am on 22nd October 1998. The Appellant was away from home and did not return until 1.30pm. After his return the police arrested him on suspicion of receiving stolen property. The Appellant immediately responded that he would show the police what he believed they were looking for. He took them to an old Citroen which was no longer roadworthy but which was parked outside his premises.

He explained to the officers that he had gone to the vehicle to collect some tools that very morning prior to taking his children to school. To his surprise he found two plastic bags on the rear shelf. He denied investigating the contents of the bags, but he admitted that he had suspected that the contents consisted of stolen property. He explained that having found the bags he had taken them to a wooden shed in his garden where he had put them for safe keeping prior to making up his mind what to do about them.

These two plastic bags were examined by the police and found to contain silver which had come from a burglary of Mr Dangerfield's house on 13th October 1998. The receipt of this property by the Appellant was charged in count 2. The Appellant was detained overnight at the Rouge Bouillon Police Station and on the next day was taken back to his house for a detailed search of the whole property. In a brick shed in the garden police found a black holdall containing silver stolen on 15th October 1998 in a burglary at the premises of Mrs Germain and Miss Stievenard. The police did not

confront the Appellant with the discovery of this property at the time and waited to do so until he was interviewed later that day.

During that interview he denied any knowledge of the existence of such a holdall or indeed the silver inside it but speculated that some mischievous person must have entered his garden and secreted the property in the shed with a view to implicating him in crime.

His defence in relation to count 2 (of which he was convicted) was that although he knew that he was in possession of the property and suspected it was stolen, he claimed that he had not had sufficient time to decide what to do with it by the time of his arrest. His defence to count 1 (of which he was acquitted) was a denial of possession, or any knowledge of the existence of the stolen property on his premises. Both defences were forecast in the Appellant's interviews.

Additional Evidence

The Crown had in their possession evidence to rebut these defences. Such evidence came from Jacob Corvel, who had committed both the burglary of Mrs Germain's and Miss Stievenard's home and the burglary at Mr Dangerfield's address. The Crown were also in possession of evidence from relatives and accomplices of the thief supporting the evidence which he was capable of giving against the Appellant.

In relation to count 2, Corvel admitted in a statement to the police that the bags and their contents, recovered from the Appellant's wooden shed, had been stolen on 13th October 1998. He recounted how he had left the property with his brother for safe keeping for a short while and that he and his brother had then telephoned the Appellant, who indicated his willingness to buy it. Corvel claimed that the Appellant had told him to leave the silver in the Citroen car, which he did on 20th October, travelling to the address in the company of his sister, Natasha, and his girlfriend Zoe Burton. Both women made statements confirming the journey. Mark Miller, Corvel's accomplice in the burglaries, supported the account of the receipt by the Appellant of this stolen property.

In relation to Count 1, Corvel related how this property had been stolen in the black holdall from the house at Gorey of Mrs Germain and Miss Stievenard on 15th October 1998 by himself and Miller. He said that on the same day he had visited the Appellant's home and arranged to sell the silver, valued at just over £1,000, for between £175-200; and that he went to collect the money from the Appellant the following day in a car which contained both Miller and Zoe Burton. These two persons also made statements to the police confirming this journey (though they said it was made on 20th October).

Corvel also suggested that between these events and the trial, the Appellant had approached him with a bribe to withdraw what he had said to police in return for a large sum of money. Nothing came of the offer but the details were put forward in evidence by the Crown as material probative of guilt on both counts.

It will be appreciated that the available evidence to establish the Appellant's culpability on these charges was formidable. What Corvel and his brother said concerning conversations with the Appellant consisted of clear evidence that the

Appellant had agreed to buy, and had later received, the stolen property the subject matter of count 2. If their evidence and that of the two other witnesses was accepted it was also clear that the Appellant had lied to the police as to the circumstances of his receipt of this property.

Moreover Corvel's corroborated evidence that he had delivered the silver, the subject matter of count 1, to the Appellant after the latter had agreed to buy it for a sum which represented only a fraction of its value, was capable of rebutting the Appellant's claim that he was unaware of the existence of that silver on his premises.

No objection could be taken to this supporting evidence; nor did Advocate Scholefield do so.

The questioned evidence

However at the trial the Crown sought to introduce evidence of prior dealings in stolen property by Corvel with the Appellant.

The evidence consisted of visits by Corvel to the Appellant's premises on occasions other than those mentioned in the indictment and selling to him property from other burglaries committed by himself and Miller in the months of September and October 1998.

In particular the Crown sought to adduce evidence that the Appellant had received property stolen in a burglary committed at Mr Dangerfield's premises three weeks prior to the burglary whose proceeds were the subject matter of count 2. This earlier burglary resulted in the theft of snuff boxes, spoons and other objets d'art. Corvel's account was that the Appellant had bought some of this property for between £200 and £300, significantly less than its true value.

Corvel also claimed that during the September/October period he had sold to the Appellant other stolen property valued between £15,000-£25,000 for a total sum of about £1,000. Indeed, according to Corvel, the Appellant had been receiving stolen property for twenty years. The detail of this claim, when explored in cross-examination by Advocate Scholefield, was that the Appellant had received all manner of property. *"You name it, he's been doing it"* was how Corvel graphically put it.

The legal framework

The Crown notified the defence of its intention to call this evidence. The defence objected. The argument before the Deputy Bailiff proceeded on the basis that the evidence was admissible by virtue of the decision in R -v- Powell following the early 19th century authority of R -v- Dunn & Smith (1826) 1 Mood. CC 46. The essence of the decision is to the effect that on charges of receiving stolen property, and in order to rebut the defence of honest intention, the Crown may call evidence from the thief not only that the property the subject matter of the indictment was stolen to the knowledge of the accused, but where appropriate that on a prior occasion the accused had received stolen property from the same thief. Though this was a decision of an English court, it was argued that it should be followed in this jurisdiction.

The report of R -v- Dunn & Smith is brief and merely descriptive of the facts of the case and the conclusions of the trial judges, Mr Justice Gaselee and Mr Justice Littledale who presided at the Old Bailey Sessions in September 1826, and the appellate Judges who met during the following Michaelmas term to review the convictions. The judgments at first instance and on appeal are not quoted. The report of R -v- Powell is even more succinct.

The Crown sought to rely on a reported statement by Phillimore J. in argument before the Court of Criminal Appeal in R -v- Powell: ***"But the thief's evidence as to the antecedent receiving was admissible under the common law to rebut evidence given to prove the honest intention of the receiver"***. It is clear that his reference to the common law was a reference to R -v- Dunn & Smith.

Research has revealed no case in England in which the Powell decision has been invoked since 1909. This should cause no particular surprise. The rule is no more than a reflection of the similar fact principle, of which it is an illustration, though confined to cases of receiving stolen property, to the evidence of the thief who had sold property to the accused on another occasion, and to cases in which the defence involves an assertion of lack of guilty knowledge.

The infrequency of the invocation of the rule in England, was, no doubt, also due to certain statutory provisions in the Larceny Act 1916 (which re-enacted provisions of the Prevention of Crimes Act 1871) and the Theft Act 1968. These provisions provided a statutory basis for the calling of evidence of a similar kind to that suggested in R -v- Powell. We shall have to consider these provisions and their potential application to this jurisdiction later. Suffice it to note that the relevant section of each Act imposed a statutory formula for the introduction in evidence of antecedent conduct by the accused which would be otherwise inadmissible.

There can be no doubt that the reason for the existence of these special rules, common law and statutory, stemmed from the difficulty and the frustration of proving charges against criminals who habitually received stolen property and who defended their conduct on the grounds of ignorance of the origin of the property concerned.

The legal issues canvassed

During the argument before this court, for which we are indebted to both sides for the care of their research and the cogency of their submissions, it became apparent that notwithstanding the result of this appeal, it would be helpful if the court in giving judgment would consider certain matters of relevance to the application of the Powell decision in this jurisdiction.

Accordingly, in this judgment we seek to answer two questions:-

(1) What is the ambit of the decision in R -v-Powell, and should it be adopted as part of Jersey law?

(2) Should the principle underlying the statutory provision in s.43(1) Larceny Act 1916 be adopted in this jurisdiction?

(1) The Ambit of the decision in R -v- Powell

Since the Crown based their application before the Deputy Bailiff to call evidence of Corvel's prior dishonest dealings in property between himself and the Appellant exclusively on R -v- Powell, the question arises whether the evidence of antecedent dealing is admissible only to rebut evidence given to prove the honest intention of the receiver or whether it is admissible to rebut other defences which, impliedly rather than expressly, include a denial of dishonest intent.

The rationale for the admission of any such evidence is that it goes further than to demonstrate that the accused habitually dealt in stolen property. If that was the limit of what the evidence could achieve, it would be inadmissible on the well recognised basis that as a general rule the prosecution may not adduce evidence tending to show that the accused has been guilty of criminal acts other than those charged. What such evidence needs to show is not 'mere' propensity; but rather it must be capable of contradicting the defence advanced by showing that the accused had reason either to know that the property was stolen or to believe that it might well have been or to be put on enquiry about its origins, depending on the circumstances of the particular case.

It is worth noting in passing that it is irrelevant whether a claim of lack of knowledge is made by an accused in an interview with the police, or for the first time in the witness box at his trial. Evidence in contradiction may be given either as part of the Crown case or in rebuttal, according to whether the Crown could or could not have reasonably anticipated the defence put forward.

The language of s.43(1) Larceny Act 1916 is unequivocal in limiting the admissibility of the antecedent conduct ***"for the purpose of proving guilty knowledge...."*** Section 27(3) Theft Act 1968 has a similar limitation. The authorities on the statutory provision underline the importance of restricting the admissibility of the evidence to such circumstances.

Lord Lane LCJ in R -v- Wilkins (1975) 60 Cr.App.R. 300 emphasized that great care should be taken in any summing up, to ensure that the Jury use the evidence in relation to, but only in relation to, counts where the issue is guilty knowledge. In Wilkins the accused was charged *inter alia* with handling a substantial quantity of stolen property.

The first handling charge (count 3) concerned a quantity of stolen jackets and raincoats which had been found in plastic bags in the garden of her premises. Her defence was that she did not know of the existence of the articles and accordingly that they were at no stage in her possession.

Count 4 charged her with handling stolen jewellery and silverware which had been found concealed behind a drawer in her bedroom. Her defence to this charge was also that she had no notion that such property was on her premises.

Count 5 concerned stolen velvet, quantities of which had been found during the search of her house. The accused's defence to this charge was that she had purchased it in good faith, and that from what she had been told by the seller, she had no means of knowing that it had been stolen.

Lord Lane commented: ***"The Appellant's may not have been a very convincing story, but that was the story."***

It follows that the last count was the only count to which the issue of knowledge or belief that the goods were stolen was relevant. At the trial the Crown were allowed to call evidence that the Appellant, within the statutory period, had been convicted of handling stolen property.

The statutory basis of admissibility in <u>Wilkins</u> was section 27(3) of the <u>Theft Act 1968</u>, the material part of which reads as follows:

> ***"Where a person is being proceeded against for handling stolen goods (but not for any offence other than handling stolen goods) then at any stage of the proceedings, if evidence has been given of his having or arranging to have in his possession the goods the subject of the charge.....the following evidence shall be admissible <u>for the purpose of proving that he knew or believed the goods to be stolen goods</u>.......(b) (provided that seven days notice in writing has been given to him of the intention to prove the conviction) evidence that he has within the five years preceding the date of the offence charged been convicted of theft or of handling stolen goods."*** (our underlining).

Having cited the section, Lord Lane, continued:

> ***"That section, as is plain from the wording, is designed to help the jury to determine the difficult question of whether or not they feel sure that the defendant has the necessary guilty knowledge at the time of the handling. It has no relevance at all to the question of possession and it is quite wrong that the jury should be allowed to think that their decision on the question of possession can be influenced by such evidence if it is admitted by the judge. Thus, where there are a number of counts in an indictment alleging handling, in some of which possession is the issue and in some of which guilty knowledge is the issue, very great care should be exercised by the judge first of all before he allows evidence of the previous convictions to be given at all or, if he does allow that evidence to be admitted, very great care should be exercised in order to ensure that the jury realise the issues to which those previous convictions are relevant - namely those counts in which guilty knowledge is involved and not those counts in which possession is the only, or the primary, issue."***

Lord Lane concluded:

> ***"....the learned judge did not make clear to the jury the distinction which I have endeavoured to outline. When one reads his direction to the jury, it appears, and the jury themselves would no doubt have thought, that they***

> ***were entitled to look at these convictions in order to determine whether or not they were satisfied that the appellant had possession of the raincoats and also of the jewellery and silverware.***
>
> ***In those circumstances this Court has come to the conclusion that this was plainly a misdirection and that, so far as counts 3 and 4 are concerned, those convictions must be quashed. There is no reason why the conviction on count 5 should be quashed because that was a count where the issue was one of guilty knowledge and the jury were perfectly entitled to apply what they had heard about this woman's convictions to their determination of that issue."***

In our view Lord Lane's observations, applicable to the statutory provision, are equally applicable to the principle expressed in R -v- Powell.

A further question canvassed in argument before this court was whether it was inherent in this principle that it was sufficient to produce evidence of antecedent conduct directed merely to the fact of the receipt of stolen goods by the receiver from the thief or whether the principle depended on proof that the goods had been stolen to the knowledge of the receiver.

If the object of the admission of the evidence is to establish guilty knowledge in relation to the property described in the indictment, it follows that the relevance of the antecedent conduct must be directed to the state of mind of the accused. Unless it can be proved that the accused knew that the earlier consignment had been stolen, such evidence can provide no clue to the accused's state of mind at the relevant time.

An analysis of the report of R -v- Powell establishes that the court accepted this proposition and had in mind not merely the previous conduct but the state of mind which accompanied it. As we have seen the statement of the common law in the form of an intervention in argument attributed to Phillimore J. is ***"But the thief's evidence was admissible under the common law to rebut evidence given to prove the honest intention of the receiver".*** Reference is made to the nature of that evidence in the summary of the judgment of the Lord Chief Justice: ***"It was not necessary to rely on the statute for proving the conversation between the thief and the receiver as to the sale of the former stolen property".*** No detail of that conversation is given in the recital of the facts of the case but the only relevant conversation can have been that which supplied proof that the receiver was aware that the goods had been stolen.

The precise inference to be drawn from such evidence cannot be gleaned from the report of R -v- Powell nor from the facts of the earlier case on which the principle is based. It may extend to an inference of an accepted arrangement between thief and receiver that the latter should act on the former's behalf regularly to dispose of stolen property or, at the other end of the evidential scale, to justify the conclusion that having been once bitten, the accused should have been twice shy at accepting goods from a man whom he knew from experience to be a thief, and that the circumstances ought to have acted as a warning against any future dealings.

As we shall see, the relevant sections of the Larceny Act and the Theft Act which give a measure of statutory effect to the principle have not reflected this aspect of it. Indeed, proof of previous convictions for receiving stolen property excepted, evidence of antecedent conduct has been introduced under these provisions limited to the mere fact of possession of stolen property without accompanying proof as to the state of mind of the accused in relation to that property.

This limitation in the statutes may be one reason why the judiciary in England have reacted guardedly to both sections. Their reaction is perhaps not surprising given the centrality to the criminal law of the principle that the prosecution cannot adduce evidence of an accused's criminal disposition and the fact that it is subject to so few exceptions. It was Lord Goddard's general view in R -v- Davies [1953] 1 QB 489 that:

> ***"The statutory provision (i.e. section 43(1) of the Larceny Act 1916) which originally appeared in the Prevention of Crimes Act 1871, is in itself a great departure from the ordinary rules which apply to evidence in criminal trials. As is well known, evidence of bad character or previous convictions is not admissible in chief in any other case and we need not consider the cases in which it may become admissible by way of rebuttal owing to the prisoner putting his character in issue. It is evidence of a most prejudicial kind and is only allowed in receiving cases because the legislature, no doubt, recognized the difficulty which often arises of proving guilty knowledge in receiving cases."***

To understand the way in which the two sections have been interpreted, it is important to set them in an historical context. As Lord Goddard observed in Davies the statutory provision in the Larceny Act re-enacted s.19 of the Prevention of Crimes Act 1871 which itself abrogated the effect of the decision in R -v- Oddy (1851) 2 Den. 264. The accused in that case was charged with receiving stolen cloth. The trial judge admitted evidence of the accused's possession of other cloth stolen three months previously. The Court for Crown Cases Reserved held that such evidence proved no more than that the accused was in the habit of receiving stolen cloth and that therefore the evidence was inadmissible. The Court took the view such evidence would have been admissible only if there had been an additional nexus between the two items and suggested that a sufficient nexus could have existed if both items had been stolen by the same thief, relying on R -v- Dunn & Smith *op cit* and R -v- Mansfield (1841) Car. & M. 140.

Such a restriction on the introduction of this sort of evidence did not appeal to those concerned to facilitate the convictions of receivers of stolen property. Section 19 of the aptly named Prevention of Crimes Act 1871 and s.43 of the codifying Larceny Act 1916 were the result.

The statutory provision, wider than the principle in Powell's case, must therefore be regarded as a legislative response to the exigencies of prosecuting the offence of receiving stolen property. An examination of subsequent authorities reveals the way courts have struggled to reconcile the expediency inherent in the provision with its potentially harmful effects as an exception to the general law. This struggle can best be illustrated in relation to whether courts have thought it right to admit evidence of the

circumstances in which the previous stolen goods came to be in the possession of the accused.

In truth, as we have observed, it is difficult to see how the accused's behaviour on another occasion can be relevant unless it be to act as an indicator of his state of mind at the time concerning the charge or charges he faces. Since the language of section 43(1) restricts the evidence of such other conduct to cases where the defence involves lack of guilty knowledge, it might be supposed that some evidence of the circumstances of the previous possession would be the minimum necessary to justify the admission of such evidence in order to prove a guilty mind at the relevant time.

But the restricted language of the section led to a divergence of judicial opinion whether the circumstances of the previous possession as distinct from the fact of possession *simpliciter* ought to be admitted. A strict interpretation of the statute and an expressed desire to protect the accused from the prejudice which might accompany the detail of the previous conduct, led to the anomalous position that courts have refused to permit the introduction of the very evidence which would allow the tribunal to draw the inference demanded by the provision.

This illogical line of authority was introduced by the English Court of Appeal in R -v- Bradley (1980) 70 Cr.App.R. 200. But it was not always thus. Prior to this decision, it was possible to prove in evidence both the fact of prior possession and the circumstances surrounding that possession. In R -v- Smith [1918] 2 KB 415, the Court of Appeal held that it was proper to admit evidence of the circumstances of the possession of property on an earlier occasion by proving what the accused had said about his possession of property at his earlier trial for receiving it.

R -v- Smith was a decision in respect of s.43(1). The decision in R -v- Bradley was based on an interpretation of Section 27(3) of the Theft Act 1968. The difference is not material. In Bradley the accused was charged with receiving a stolen ring. He was the owner of a bric-a-brac shop. In November 1977 he purchased the ring for a fraction of its value from the woman who had stolen it. He told lies about the circumstances of the purchase when later questioned. At his trial his defence was that he did not know, and had no reason to believe, that the ring had been stolen. The Crown led evidence that in August 1977 the accused had had on display in his shop another ring which was proved to have been stolen.

Shaw LJ held, despite the decision in Smith, that the statute did not permit evidence to be given of what in effect was another offence of handling. He concluded that the proper construction of the statute ***"does not extend to the details of the very transactions as a result of which that earlier property had come into the possession of the accused. As appears from its terms the section was not designed to allow evidence to be given of what in effect is another offence of handling apart from that which is charged. The law in general excludes evidence of similar offences, save in special circumstances; and the present case does not come within the ambit of any other statutory provision which justifies that evidence being given."***

The passage demonstrates that rather than construe the provision as an extension of the similar fact rule the Court sought to make it a discrete exception to the general rule. Hence the jury were not to be made aware of the circumstances of the earlier handling.

In deciding that the evidence about the previous ring should be limited to the fact of its having been stolen and the fact that it was physically in the accused's shop three months prior to the events with which the indictment was concerned, Shaw L.J. provided no clue as to how the Jury were to evaluate the evidence in deciding whether or not the accused was or may have been telling the truth concerning the ring the subject matter of the count in the indictment. Unless the accused could be fixed with knowledge that the earlier ring had been stolen, mere possession of such stolen property was of no probative value at all. It is, after all, the occupational hazard of the owners of such shops that they are offered and, despite their best endeavours to avoid it, may purchase goods which have in fact been stolen. In the absence of circumstances proving the accused's guilt in relation to the earlier ring, what assistance did the evidence supply to the Jury that in the course of his business the accused had been in possession of another item of stolen property?

As Professor Smith says in his commentary on Bradley:

"The mere fact that the defendant was in possession of stolen goods on some other occasion is entirely irrelevant to the question whether he knew the goods were stolen on the present occasion. Any person, however honest, may have the misfortune to take possession of stolen goods".

He adds:

"The evidence of possession is admitted expressly for the purpose of proving that the defendant knew or believed that the goods he handled on the present occasion were stolen goods....Thus the section, as interpreted, allows the irrelevant evidence to be admitted and excludes that further evidence which alone could make the admitted evidence relevant" [1980] C.L.R. 174.

The strict interpretation of the section adopted by Shaw L.J. in Bradley was approved by Mustill L.J. (as he then was) in R -v- Wood (1987) 85 Cr.App.R. 287. In rejecting the reasoning in Smith and approving that in Bradley he said:

"The later case was decided under section 27(3) whereas Smith.......was founded on section 43 of the Larceny Act 1916, the wording of which differed in some respects from that of section 27(3). Nevertheless the differences appear immaterial and it seems that there is a direct conflict of authority. For our part we prefer the more recent decision, for, notwithstanding the practical anomalies which it entails, the conclusion is, in our judgment, the only one which is consistent with the clear words of the statute."

However, the Court recognised the difficulties inherent in their decision. Lord Justice Mustill continued:

> ***"On the one hand if section 27(3)(a) is given a literal interpretation, the consequence will be that the jury is to be told simply that the defendant was on a previous occasion found to be in possession of stolen goods, without being furnished with any facts upon which they could base a conclusion as to whether on that occasion the possession was guilty or innocent: and they might well be tempted to assume that since they have been told about the incident, this must be because some guilty knowledge attending it could properly be inferred. The task of conveying to the Jury that the only relevance of the fact is that the previous occasion would have served as a warning to be more careful in future (if indeed this is the rationale of paragraph (a)) will not be easily performed. On the other hand to let in evidence of circumstances from which the existence of guilty knowledge on the prior occasion could be inferred would be such a striking inroad into a general rule which excludes evidence of prior unconnected offences that one would need clear words in the statute to justify it, and section 27(3) is quite silent."***

The narrow interpretation of the wording in the statute may have had as its object the requirement to reduce or restrict prejudice; but its effect provides the Jury with highly suggestive evidence, while leaving them with no material with which to assess it. The criticisms of Professor Smith and Lord Mustill on the operation of these sections do not stand alone. Indeed the Criminal Law Revision Committee proposed the repeal of section 27(3) of the Theft Act 1968 in their Eleventh Report in 1972. We, respectfully, echo these criticisms.

We have also had to consider another strand of authority which has resulted from consideration of the circumstances in which the court may admit evidence of other conduct under the statutory provision. Following R -v- Ballard 12 Cr.App.R. 1, Lord Goddard in R -v- Davies *(supra)* held that the section should only be invoked if the counts in the indictment related exclusively to receiving stolen property. At p.493 of the report he said:

> ***"If the case is substantially one of receiving and is presented to the Jury on that footing, so that they are not being asked to find a verdict on some other count, evidence of a previous conviction may be admitted. At the same time, it cannot be admitted where there is another charge on which a verdict is sought and we think that the only right rule to lay down is that if the prosecution feel that they cannot confine their case to one of receiving but must also rely on some other count, be it of stealing or of being an accessory after the fact to stealing, then if they include in the indictment a count for either of those offences they must refrain from giving evidence of previous convictions".***

We see no reason to deny the extension of this authority to a situation in which the evidence is adduced under the principle in R -v- Powell. Lord Goddard's strictures apply as much to that principle as they do to the principles underlying the statutory provision.

A further matter to which we have given consideration concerns supporting evidence corroborating that of the thief. In this case after Corvel had given evidence but before the evidence of any supporting witness had been heard, the Crown further

submitted that the principle permitted evidence from the thief but was not limited to his evidence, and urged the Deputy Bailiff to admit the evidence from Miller, Corvel's accomplice in the burglaries, which supported Corvel's testimony of his previous criminal association with the Appellant.

The Deputy Bailiff rejected the application to include the supporting evidence with these words:

> ***"....I think that the exception to the rule must be strictly construed otherwise prejudice is going to happen. So I think, Mr Wheeler, I am not going to allow evidence which supports the previous suggested offences of handling by Mr Manning because Mr Manning is not charged with those offences"*** (p.95G-p.96A of the trial transcript).

The line of reasoning adopted by the Deputy Bailiff is not clear. If a court admits the evidence of the thief under the principle in R -v- Powell, the court must necessarily conclude that the evidence of previous offences is admissible to prove the charges notwithstanding that there is no count in the indictment relating to those other offences and notwithstanding that the evidence of those other offences will prejudice the accused in relation to the offences for which he is being tried.

In our view once a court rules admissible the evidence of the thief in respect of other offences on the Powell principle, logic compels the admissibility of any relevant evidence supporting that of the thief. We do not consider that there is anything which prevents the Crown from introducing such evidence. In this context the Powell principle manifestly includes the evidence of the thief but does not limit the evidence to that of the thief alone. If, by way of example, in R -v- Powell the Crown had had available evidence from an additional witness of the conversation between the thief and the accused, there would have been nothing to prevent that evidence from being adduced in support of the thief's testimony.

The ambit of the principle in R -v- Powell in our judgment may be thus summarised:

(1) It is limited to cases where the allegation is one of receiving stolen property.

(2) The principle can only be invoked in cases where the issue in the trial relates to the guilty knowledge of the accused as to the stolen nature of property with which he is charged.

(3) The evidence adduced must include evidence from the thief who stole the property and must relate to dishonest dealings in stolen property between that same thief and the accused on a prior occasion or occasions.

(4) The evidence must be capable of proving not just that the antecedent property was stolen but in addition that the accused was aware of that fact.

(5) Such evidence may include evidence from a source additional to, and corroborative of, the thief's evidence as the two matters to be proved in (4) above.

We add for completeness that in our view, there is no doubt that the statutory provisions in both Acts did not supplant the Powell principle in England. The differences between the common law principle and the statutory provisions are clear from a comparison between the principle as defined above and an analysis of the language of s.43(1) and s.27(3). There is scope for the application in England in appropriate cases of the rule as an alternative to the statutory provisions, and the differences are sufficiently significant for some evidence to be admissible under the common law principle but not under the statutory provisions, and vice versa.

In our judgment this common law principle, though based on the rather limited authority of Powell, is a principle which should be recognised as forming part of the Jersey criminal law.

(2) Should the statutory provision be applied in this jurisdiction?

The criticisms which s.43(1) and s.27(3) have attracted in courts of first instance and appellate courts and from academic commentators have resulted in a real reluctance on the part of prosecutors to rush in where judicial angels have feared to tread.

The fate on appeal of a number of convictions recorded in English courts by the use of the sections is well documented and we have rehearsed the criticisms, justified in our view, which they have attracted. In these circumstances we should be loath to hold that the statutory provisions are to be applied in this jurisdiction. Fortunately in our view neither law nor logic compel us so to hold.

The extent of the application of the Larceny Act 1916 to the law of Jersey was explored in Foster -v- A.G. 1992 J.L.R. 6. Le Quesne J.A. considered the development of the prosecution of fraud and the extent to which the concept of fraud as a crime made use of the experience of other jurisdictions notably that of France and England. Sir Godfray continued:

> ***"Such a process was essential to the development of the law in a small jurisdiction like Jersey. It is the link between law as a theoretical study and law as a practical tool. When an offence is known by so comprehensive a term as "fraud", some definition of it is needed in the interests both of the state and of its citizens. The state and its representatives and the citizens both need to know whether conduct alleged or proved against a defendant is indeed criminal conduct. Sometimes the definition is provided by statute. In Jersey this has occurred rarely by local statute and never on the subject of "fraud". Sometimes it is provided by judicial precedents. This is possible only if cases arise frequently and if not only the decisions but also the reasons for the decisions are adequately recorded. In Jersey in earlier times neither condition was satisfied.***

In this situation, the Jersey lawyers turned for help to a different source. They borrowed terms and their definitions from the law of neighbouring countries in which the law of fraud had been developed and types of fraud had been defined more fully than in Jersey. We have seen that terms were borrowed from France in the first half of the 19th century. In the second half of the century the use of English categories and English terms (in translation) began.

In this century the use of English categories and English terms in prosecutions for fraud has increased very greatly, almost to the exclusion of any other mode of proceeding. After the enactment in England of the Larceny Act 1916, the use of the categories and the definitions of that Act became more and more widespread here. The position now reached is that cases falling within the scope of that Act are prosecuted here as far as concerns pleading and the identity of the essential elements of the offence charged, exactly as they would be in England."

Sir Godfray explored the history of the charge of "fraude" within this jurisdiction, and noted that until the middle of the 19th century the Royal Court was exercising the power to adapt and develop the criminal law in the course of dealing with individual cases, while at the same time looking to England to supply precedents. He cited Lord Maugham's analysis of the development of the law of Jersey in Renouf -v- A.G. [1936] A.C. 472 that in the last century it became usual to refer to English legal works and precedents as authorities, and for the Royal Court in many cases to regard the English law as a guide to establishing a modern law of Jersey.

Sir Godfray continued:

"While this development was going on, cases were still occurring in which defendants were charged "d'avoir commis une fraude." These cases were not frequent but, as we have seen, they occasionally occurred at least up to the 1930s. This is a most important circumstance, for it shows that the practice of charging offences in the terms of the English Larceny Act did not supplant the common law of the Island but took place within it. The development of this practice did not preclude (to use the language of the Commissioners already quoted) "an enlargement of the range of punishable crimes." The criminal character of conduct covered by the Larceny Act is derived in Jersey from the common law. The development of the practice has not changed this derivation of criminality. It means only that conduct which is both criminal by the common law and also within the ambit of the Larceny Act may be prosecuted according to the provisions of that Act. This is convenient for both prosecution and defence, for it substitutes the relatively clear requirements of the Act for the boundaries, hitherto vague and ill defined, of the common law offence."

In our view Sir Godfray's exhaustive research into the way in which the provisions of the English Larceny Act have been adopted into the law of Jersey defines the limits of that adoption. As we have observed the Larceny Act was a codifying statute whose sections proved to be of use and relevance in this jurisdiction in so far as they defined criminal conduct. But there is nothing in Sir Godfray's judgment which would justify the

conclusion that those parts of the same statute which prescribed evidential rules for English courts should have any application in Jersey. Indeed an examination of the provisions of s.43(1) satisfies us that the section cannot apply here.

The section reads:

"Whenever any person is being proceeded against for receiving any property, knowing it to have been stolen, or for having in his possession stolen property, for the purpose of proving guilty knowledge there may be given in evidence at any stage in the proceedings-

(a) the fact that other property stolen within the period of twelve months preceding the date of the offence charged was found or had been in his possession;

(b) the fact that within the five years preceding the date of the offence charged he was convicted of any offence involving fraud or dishonesty.

This last mentioned fact may not be proved unless-

(i) Seven days notice in writing has been given to the offender that proof of such previous conviction is intended to be given;

(ii) evidence has been given that the property in respect of which the offender is being tried was found or had been in his possession."

It is not easy to see how the provision of a statutory time limit of twelve months or one of five years in paras (a) and (b), nor indeed how the provision for a notice to be served outside a stipulated seven day period, could have any effect in this island unless enacted by the States. An English statute cannot impose a time limit in Jersey.

Conclusion

We therefore conclude that the common law principle derived from R -v- Powell rather than s. 43(1) Larceny Act 1916 is the appropriate authority for the introduction of prior conduct in relation to prosecutions for receiving stolen property in this jurisdiction.

There can be no doubt however that, though confined to a particular offence and in relation to a particular defence and to evidence from a special source, the principle is an illustration of a wider rubric that evidence of other criminal conduct is admissible notwithstanding its prejudicial effect if it be relevant to an issue in the case. We are confident that the limits of the principle which we have defined above will assist in its application in this jurisdiction.

It would not be appropriate in this judgment to define the interaction between this principle and the much broader question of the application of the principles of similar fact evidence in this jurisdiction in the light of the recent review of those principles in the English case of the DPP -v- P [1991] 2 AC 447. We heard no argument on that interaction and it is in our view unnecessary, in view of the restrictions we have placed on its application, and undesirable, in view of the absence of such argument, to pass any judgment on that interaction. The principles of similar fact clearly exist independent of R -v- Powell, but the application of those principles to a case whose factual matrix falls outside the scope of the Powell principle must be left to another court and another day.

The Deputy Bailiff's ruling

We turn now to the application of the Powell principle, as we have defined it, to the instant case to discover whether it was applied appropriately.

We have already stated the issues on the two counts in the indictment. Both in interview and in evidence the Appellant contended in relation to count 1 that he was unaware that the holdall containing silver was in the brick shed in his garden; and in relation to count 2 he claimed that though he was aware of the presence of the silver in the plastic bags and aware that it must have been stolen, he had not had an opportunity to determine what to do with it at the time of his arrest. Just as in Wilkins, it may not have been a very convincing account but this is what the Appellant claimed in his defence.

In relation to these defences, the issue of guilty knowledge did not arise. In Wilkins, at least on one count, that was the issue and the trial judge failed to warn the jury to confine the use of the antecedent evidence to that count. In this case the evidence of antecedent conduct was irrelevant on both counts. There was no basis for the invocation of the principle and the evidence of prior dealing between Corvel and the Appellant was not admissible.

The appeal must therefore succeed.

We were urged to apply the proviso by Advocate Robinson. In our view in this case that would not be a proper course. The evidence was prejudicial and had no probative value. Article 25 of the Court of Appeal (Jersey) Law 1961 allows us to apply the proviso only if we consider that ***"no substantial miscarriage of justice has actually occurred"***. In view of the wrongful admission of this prejudicial evidence we consider there has been a substantial miscarriage of justice, and as we indicated on 14th December 1999, we allow the appeal on this ground, quash the conviction and order that the sentence be set aside.

Authorities

R -v- Powell (1909) 3 Cr.App.R. 1.

R -v- Dunn & Smith (1826) 1 Mood. CC 146.

R -v- Davies [1953] 1 QB 489.

R -v- Oddy (1851) 2 Den. 264.

R -v- Mansfield (1841) Car. & M. 140.

DPP-v- P [1991] 2 AC 447.

R -v- Girod (1906) 22 TLR 720.

R -v- Wilkins (1975) 60 Cr.App.R. 300.

R -v- Bradley (1980) 70 Cr.App.R. 200.

Phipson on Evidence (14th Ed'n): p.112: para. 7-05.

R -v- Robinson & Anor (1864) 4 F & F 44.

Davies -v- DPP [1954] 1 All ER 507.

R -v- McGranaghan (1995) 1 Cr.App.R. 559.

R -v- Downey (1995) 1 Cr.App.R. 547.

Larceny Act 1916 s. 43.

R -v- Wood (1987) 85 Cr.App.R. 287.

R -v- Ballard 12 Cr.App.R. 1.

Foster -v- AG 1992 JLR 6 CofA.

Renouf -v- AG [1936] AC 472.

Archbold: Pleading Evidence & Practice in Criminal Cases (36th Ed'n): Section 10: Receiving stolen property: pp.767-80.

R -v- Smith [1918] 2 KB 415.

Vibert -v- AG 1991 JLR 247 CofA.

Archbold (1999 Ed'n): pp. 21/1314-1838.