MARSH v THE PEOPLE (1967) ZR 185 (HC)
HIGH COURT
MCCALL J
22nd DECEMBER 1967

Flynote and Headnote

[1] Criminal law - Conveying stolen property - Owner known - Section 287 of Penal Code construed.
Where the owner of property alleged to have been stolen is known, a person may not be properly charged under section 287 of the Penal Code.

[2] Companies - Managing director - Responsibility of managing director for acts of employees of the company.
The managing director of a company cannot be charged with knowledge of all of the particulars of his company's transactions.

[3] Criminal law - Conveying stolen property - Section 287 of Penal Code construed - Meaning of the phrase "convey in any manner".
The meaning of the expression " convey in any manner", as used in section 287 of the Penal Code, extends beyond actual physical transport or carrying of the property by the accused himself and includes acts by which the accused causes the property to be conveyed.

[4] Criminal law - Conveying stolen property - Constructive conveyance.
In order to establish a constructive conveyance, the prosecution must show (1) the act of conveying in respect of the property in question, (2) that the accused had knowledge of the property to the extent of knowing what it was, and (3) that he specifically authorised its conveyance.

Case cited:
(1) *Mandevu v R* 1962 R & N 298.

Statutes construed:
Penal Code (1965, Cap. 6), s. 287, as amended.
Criminal Procedure Code (1965, Cap. 7), s. 176.
Jones, for the appellant
Reilly, Senior State Advocate, for the respondent

Judgment
Mccall J: The appellant was convicted on 25th October, 1967, of the offence of conveying property, namely a quantity of copper reasonably suspected of having been stolen, contrary to section 287 of the Penal Code, and fined £500. From this conviction he now appeals. Originally the particulars of the charge were that the copper might reasonably be suspected of being stolen or unlawfully obtained but at the close of the prosecution case the particular of illegal obtaining was deleted.
The appellant is managing director of Acme Scrap Metals Co. and, on 19th July, a load containing eight large pieces of copper was delivered to the Nkana Smelter in one of the company's trucks and was there offered for sale to Mr Holden, the general foreman of the smelter and acting as purchasing agent for the Rhokana Corporation. It should be said now that the appellant was not on the truck when the copper arrived at the smelter, nor is there any evidence that he had anything to do with its actual physical conveyance. Mr Holden examined the copper and " came to the conclusion that this copper belonged to the mines" and added in his evidence that it must have been taken illegally. In cross - examination he said that he "would say it is the property of the Rhokana Corporation." Earlier in examination - in - chief he had said that one of the pieces of copper in question was a blister sample and "we are the only people who cast blister on the Copperbelt." Further evidence of ownership of the copper was given by a Mr Fleming, an experienced

dealer in scrap copper. As I read his evidence he said that the copper before the court came from Rhokana Mine and was stored there. To a police officer who had been called in, the appellant said he had not purchased the copper and had never seen it before. Later he made a statement in which he admitted that it had come from his yard and delivered to the mine in his truck. A Mr Mubanga, for the prosecution, said he had bought the copper on instructions from the appellant, but it is clear from his evidence that his instructions were general and not specifically related to the copper which was the subject of the charge. Having regard to the finding I am about to make, it does not appear to me to be necessary to refer to the rest of the prosecution evidence which was concerned with the register of purchases and the quality of the copper. A submission of no case to answer failed and in his defence the appellant in effect relied upon his statement and, in cross - examination, agreed that the copper came from a mine. He was found guilty, fined £500, and, "under s.166 (a) of the Criminal Procedure Code the property to be restored to Acme Metals Ltd., and under s. 166 (b) the property to be applied to the payment of up to £400.0.0., of the fine."

This appeal succeeds for three reasons: first, the appellant was wrongly charged; second, even if correctly charged his explanation should have been accepted; and third, section 287 of the Penal Code under which he was charged should not be read so as to extend it to constructive conveyance in the circumstances of this case.

[1] The substance of the appellant's complaint on appeal is that the owner of the copper was known and therefore the charge under section 287 was bad in law. A number of cases, all collected in the *Digest of Criminal Case Law,* does indeed settle the proposition that where the owner is known a person may not be properly charged under section 287. Before the learned resident magistrate in this case there was uncontradicted evidence that the copper was the property of Rhokana Corporation. He did not accept this evidence. Instead it was found that "some of the load of copper in question had been the property of Nkana Corporation at one time and that eventually it was found being conveyed by the servants of the accused's company, with his knowledge and under his directions on 19th July, 1967, on which day the ownership of such copper was doubtful. " And again, "The court found that there was evidence from which the only reasonable inference which might be drawn was that the accused must have had reasonable suspicion that the copper was, stolen, but not such that he should have had reason to believe that it was stolen for there is no evidence that the copper was stolen other than that some of it was clearly identified as having come from the Nkana Mine, which the court does not accept as sufficient evidence to prove beyond all reasonable doubt that the copper was actually stolen." In my opinion both of these findings are wrong - the first because there is no evidence whatsoever to reduce the certain ownership given by Mr Holden to uncertain or doubtful ownership by anyone else; and the second because, apart from whatever proper distinction can be made between the inference that the accused had a reasonable suspicion that the copper was stolen and the inference that the accused should have had reason to believe that it was stolen, there was no necessity "to prove beyond all reasonable doubt that the copper was actually stolen." On this part of the case the issue was one of proof of ownership and not proof of theft. Further; the clear identification mentioned by the learned resident magistrate went much beyond an assertion that the copper merely came from the Nkana Mine. It was identified as the property of the Rhokana Corporation. The learned resident magistrate, in dealing with the issue of ownership, raises the question of applying section 176 of the Criminal Procedure Code in charges under section 287 of the Penal Code. I must confess that the point sought to be made in this part of his judgment escapes me. Section 176 of the Penal Code is purely procedural - it was not used in the case and I cannot see what application it had to it either in law or on the facts. Mr Reilly, for the respondent, has told me that he cannot advance any argument in support of this passage. In this it seems to me he is quite correct.

The appellant gave an explanation of his association with the copper in question. It was not accepted. From the judgment it appears that the reason it was not accepted was because the appellant was the managing director of Acme Scrap Metal Limited. There are these two passages: "The court finds that in either case there was a reasonable suspicion that the copper was stolen and that to the knowledge of the accused who is the Managing

Director of Acme Scrap Metals Ltd., and who the court find, cannot reasonably be unaware of the circumstances unless he deliberately turned a blind eye to the purchasing of such copper"; and then, "As Managing Director of the company the court finds that the accused must have been intimately bound up with the Company's affairs and that the load of copper in question was conveyed with his knowledge and under his direction." In my view both these findings are altogether insufficient to support the conviction. [2] A managing director can quite reasonably be unaware of some of the particulars of his company's transactions and, while he is or ought to be intimately bound up with the company's affairs, it by no means follows that part of the load conveyed under his direction was suspect to his knowledge.

The unlawful conveyance of which the appellant was convicted was found to be a constructive conveyance or, as the judgment puts it, "i.e. it was being conveyed by employees of his Company, with his knowledge and under his direction." The question now is - and I myself raised it - whether such conveyance is covered by the words "conveying in any manner" in section 287. In this connection I have the valuable assistance of the judgment of Conroy, CJ, in the case of *Mandavu v R* [1]. There the learned Chief Justice has this to say:

"We must therefore in interpreting s. 287, try to put upon the language of the legislature the plain and rational meaning of the language used and try to promote its object. We must first see whether the words themselves are precise and unambiguous and whether they are comprehensible in their natural and ordinary sense. If so, the words themselves are the best method of discovering the intention of the legislature. It is only if the application of this paramount rule of construction is unsuccessful, that other canons of construction may be applied. I consider that the words 'having in his possession or conveying in any manner anything' are in themselves precise and unambiguous...."

and later, having found that section 287 creates two offences, namely possession and conveying goods, to which the section applies, the judgment goes on:

"I am reinforced in this view by the fact that the legislature specifically defined the word 'Possession' in s. 5 of the Penal Code. This definition included not only personal possession, but also knowingly having anything in the actual possession, or custody of another person, or having anything in any place (whether belonging to, or occupied by oneself or not) for the use or benefit to oneself or of any other person. The definition also extends to cases where two or more persons are involved and one of them has actual possession with the knowledge and consent of the rest, when it shall be deemed that each of them had possession of the property. Assuming that the legislature used the word 'possession' in s. 287 in the sense in which it is defined in s. 5 of the Penal Code, then the legislature could not have intended the meaning attributed to the English s. 24 by the divisional court in *Hadley v Perks*. The restrictive interpretation in *Hadley v Perks* only applies to actual physical possession. The legislature in Northern Rhodesia has defined 'possession' to include certain types of constructive possession."

This judgment is the principal authority for the clear departure from the English interpretation of the almost identical section in the Metropolitan Police Courts Act, 1839. That interpretation is that the prosecution must show not only that the goods were in the actual physical possession of the accused but also that they were being conveyed *in transitu* in a street. This restrictive interpretation is induced by a provision relating to the right of arrest, a provision which does not apply in Zambia. But Mandavu's case deals with possession only and by reason of our definition of the word "possession" the finding was that it extended to constructive possession. [3] We have no definition of the word convey and so the question is whether the expression "convey in any manner" in section 287 is wide enough to extend its meaning beyond actual physical transport or carrying of the property in question by the accused himself.

I think it can be so extended. Here we have two separate offences - possession or conveying. If the expression is confined to actual physical conveying by the accused, the word "convey" would be unnecessary because such carrying necessarily requires physical possession and so the separate provision for conveying would be redundant and unnecessary. In my opinion, therefore, the expression "conveying in any manner" is sufficiently wide to be interpreted as including the meaning of "causing to be conveyed". But there must be a limit to this extension. Section 287 is an exceptional provision in so far as the general principle of criminal responsibility is concerned. If and when a certain stage of the prosecution is reached, the burden of proof shifts. To that extent it is a provision which is exceptionally onerous on an accused person, and thus it should be

applied not in the sense of causing conveyance in any manner whatsoever which could result in a vicarious liability, but in the sense of so doing personally and *ad hoc* the particular property concerned. To my mind there is a most substantial distinction to be made between the case of an individual personally sending such property, say, to a particular address and causing it to be conveyed thereto by means of the public postal or railway services, and the case of causing a conveyance of property by means of an instruction to employees to convey property generally and not particularly described from one place to another. On the evidence it is the latter case which was before the learned resident magistrate. There was no evidence that the appellant caused the conveyance of the copper before the court by means of a particular instruction from him to do so or that he even knew of its existence before or during its conveyance.

[4] Against this it might be argued that the wide interpretation of "conveying in any manner" would not work an injustice against the accused, because an explanation by him showing no specific personal association with the physical act of conveying would be sufficient to excuse him. In my opinion however such an argument goes too far, in that this in effect would reduce still further the already reduced burden of proof on the prosecution under the section. All the prosecution would then have to prove against the accused would be reasonable suspicion that the property was stolen and causing, however remotely, its conveyance. The offence is the act of conveying and, before the accused can be called upon for an explanation, not only has the fact of that act in respect of that property got to be proved, but also, and more important, the prosecution must show before the accused has to say anything that he, the accused, had knowledge of the property to the extent of knowing what it was and that he specifically authorised its conveyance. I see no reason whatsoever for enlarging the circumstances of constructive conveyance beyond the defined limits of constructive possession for which, in terms, knowledge is necessary.

I have already mentioned the sentence imposed upon the appellant. Although this is quite separate from the order of conviction from which order only the appellant has appealed, I must conclude this judgment by saying that that part of the sentence which restores the copper to the appellant's company is completely inconsistent with the sense of the conviction.

For the foregoing reasons the appeal its allowed.

Appeal allowed.