WILLIAM FERGUSSON .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1961

*Nov. 14
Dec. 15

HER MAJESTY THE QUEEN .....APPELLANT;

AND

WILLIAM FERGUSSON .....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Criminal law—Conviction for robbery—Substituted on appeal for unlawful possession of property—Indictment dealt with robbery alone—Whether unlawful possession an included offence—Criminal Code, 1953-54 (Can.), c. 51, ss. 288, 296, 592.

*PRESENT: Kerwin C.J. and Taschereau, Fauteux, Abbott and Judson JJ.

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Appeals—Jurisdiction—Criminal law—Appeal by Attorney General limited to pure question of law—Criminal Code, 1953-54 (Can.), c. 51, s. 598.

The accused was charged with the offence of robbery under s. 288(*b*) of the *Criminal Code* and was convicted as charged. The Court of Queen's Bench reached the conclusion that he was not guilty of robbery, and, exercising its power under s. 592(3) of the Code, found him guilty of unlawful possession under s. 296 in the view that this was an included or lesser offence to that of robbery. The indictment had contained a count for robbery only. The accused and the Attorney General were both granted leave to appeal to this Court.

Held: The accused's appeal should be allowed and the conviction under s. 296 set aside; the appeal of the Attorney General should be quashed for want of jurisdiction.

The authorities do not hold that receiving stolen goods is included in the offence of robbery or theft, but merely that recent possession of stolen goods, if unexplained to the satisfaction of the tribunal of fact, may be evidence of robbery or theft. A count in an indictment is divisible and where the commission of the offence charged includes the commission of another offence, the accused may be convicted of the offence so included if proven. Thus, a man charged with robbery may be found guilty of theft, but a person charged with robbery may not be found guilty of receiving stolen goods, as was done in this case, where the indictment contains a count for robbery alone. Receiving stolen goods is a less serious offence, but is not included in a charge of robbery. *R. v. Louie Yee* (1929), 1 W.W.R. 882, applied.

As to the appeal of the Attorney General since the appeal was based on a mixed question of law and fact and not on a pure question of law, this Court was without jurisdiction to entertain it.

APPEALS by the accused and the Attorney General from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], substituting a conviction of unlawful possession for that of robbery. Appeal of accused allowed; appeal of Attorney-General quashed.

R. Daoust, Q.C., for the accused.

Bruno J. Pateras, for the Attorney-General.

The judgment of the Court was delivered by

TASCHEREAU J.:—The appellant Fergusson was charged as follows under s. 288 (*b*) of the *Criminal Code*:

William Fergusson, en la cité d'Outremont, district de Montréal, le ou vers le 28 juillet 1959, a illégalement volé Gustave St-Germain de billets de banque, des effets de commerce et 120 coffrets de sûreté, le tout d'une valeur d'environ $50,000.00, la propriété de la Banque Provinciale du Canada, et en même temps ou immédiatement avant ou après ledit William Fergusson de s'être porté à des actes de violence contre ledit Gustave St-Germain, commettant par là un vol qualifié, un acte criminel, contrairement à l'article 288 (*b*) du Code Criminel.

[1] [1961] Que. Q.B. 542.

Section 288 (*b*) of the *Criminal Code* reads as follows:

288. Every one commits a robbery who

(*b*) steals from any person and, at the time he steals or immediately before or immediately thereafter, wounds, beats, strikes or uses any personal violence to that person,

The case was heard in Montreal before His Honour Judge M. A. Blain of the Court of the Sessions of the Peace, who found the accused guilty, and sentenced him to be detained in the St. Vincent de Paul Penitentiary for a period of eight years.

The Court of Queen's Bench[1] reached the conclusion that Fergusson was not guilty of robbery, but found him guilty under s. 296 of the *Criminal Code,* which is to the effect that every one commits an offence who has anything in his possession knowing that it was obtained by the commission in Canada of an offence punishable by indictment. The Court decided that receiving is an included or a lesser offence to that of robbery, and that under s. 592, para. 3, of the *Criminal Code,* it could substitute the verdict that in its opinion should have been found and affirm the sentence passed by the trial judge or impose a sentence that is warranted in law.

It is the contention of the appellant Fergusson that the offence of which the Court of Queen's Bench found him guilty is not an offence included in the offence of robbery, and that the Court had no power to substitute a verdict of that kind for the one that was set aside by the Court itself. It is therefore submitted that the appellant should be acquitted.

In the Court of Queen's Bench Mr. Justice Casey relied on *Duplessis v. The King*[2], to support the view that an offence must be regarded as being included in another, if the elements of the latter include those of the former. For the same proposition, Mr. Justice Choquette cited *Baker v. Regem*[3]; *Rex v. Loughlin*[4]; *Rex v. Seymour*[5]; *Rex v. Siggins*[6].

[1] [1961] Que. Q.B. 542.

[2] (1935), 60 Que. K.B. 93, 65 C.C.C. 255, [1936] 2 D.L.R. 174.

[3] (1930), 49 Que. K.B. 193, 54 C.C.C. 353.

[4] (1951), 35 Cr. App. R. 69.

[5] (1954), 38 Cr. App. R. 68.

[6] [1960] O.R. 284, 32 C.R. 306, 127 C.C.C. 409.

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In *Duplessis v. Regem,* the Court of Queen's Bench for the Province of Quebec ruled that obtaining money under false pretence is of the same nature as theft, and that it is an included offence, the only difference being the means adopted for committing the offence.

In *Baker v. Regem,* it was held that possession by the accused shortly after a burglary of goods, stolen at the time of the burglary, if unexplained, is sufficient to warrant a conviction of burglary or theft.

In *Rex v. Loughlin,* the Court of Criminal Appeal of England held that where it is proved that premises have been broken into and property stolen therefrom, and that very soon after the breaking the prisoner has been found in possession of that property, it was open to the jury to find the prisoner guilty of breaking and entering, and the jury should be so directed. The Court of Criminal Appeal in *The King v. Seymour* applied the *Loughlin* case.

In *Rex v. Siggins,* the Ontario Court of Appeal reached the conclusion that the offence of theft, where the person charged is the actual thief, necessarily involves the taking of possession by him of the articles stolen, and the person found in possession of goods which he himself has stolen, has also committed the offence of having in his possession goods knowing them to have been stolen. The Crown of course is entitled to lay both charges against him. If the jury convict of theft, they should not convict on the charge of unlawful possession. If, however, they acquit on the charge of theft, they may then consider and, if they see fit to do so, convict on the other charge. It must be kept in mind that in *Siggins* the accused was charged on two counts, one of theft and the other of unlawful possession.

These judgments do not hold that receiving stolen goods is included in the offence of robbery or theft, but merely that recent possession of stolen goods, if unexplained, to the satisfaction of the tribunal of fact, may be evidence of robbery or theft. In *Seymour* it was held that there should be two counts where the evidence is as consistent with larceny as with receiving, and that the jury should be directed that it is for them to decide whether the prisoner was the thief or whether he received a property from the thief, and should be reminded that a man cannot receive property from himself.

In the present case, there was only one count in the indictment, and the charge was for robbery in violation of s. 288(*b*) of the *Criminal Code*. A count in an indictment is divisible and where the commission of the offence charged *includes* the commission of another offence, whether punishable by indictment or on summary conviction, the accused may be convicted of an offence so included that is proved, notwithstanding that the whole offence that is charged is not proved, or of an attempt to commit an offence so included. (*Criminal Code* 569). Thus, a man charged with robbery may be found guilty of theft, but a person charged with robbery may not be found guilty of receiving stolen goods, as was held by the Court of Queen's Bench in the present instance. Receiving stolen goods is a less serious offence, but is not included in a charge of robbery.

The count must therefore include but not necessarily mention the commission of another offence, but the latter must be a lesser offence than the offence charged. The expression "lesser offence" is a "part of an offence" which is charged, and it must necessarily include some elements of the "major offence", but be lacking in some of the essentials, without which the major offence would be incomplete. *Rex v. Louie Yee*[1].

Fergusson's appeal should therefore be allowed and the conviction against him set aside.

As to the appeal of the Attorney General who submits that the judgment of the trial judge should be restored and that the accused should be found guilty of robbery as charged, this Court has no jurisdiction to make such an order. On June 26, 1961, Fergusson was granted leave to appeal by this Court, and on the same date, the application of the Attorney General was also granted. In the latter case, Mr. Justice Fauteux was "dubitante" as to our jurisdiction but, nevertheless, leave was granted. Upon consideration and a review of the whole case, the appeal of the Attorney General must be quashed.

This Court has jurisdiction to entertain appeals by the Attorney General in criminal matters under s. 598 of the Code. But, it is only where a judgment of a Court of Appeal sets aside a conviction pursuant to an appeal taken under para. (*a*) of s. 583, or dismisses an appeal taken pursuant

[1] (1929), 1 W.W.R. 882, 24 Alta. L.R. 16, 51 C.C.C. 405, 2 D.L.R. 452.

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to para. (*a*) of s. 584. Paragraph (*a*) of s. 598 states that it must necessarily be on a pure question of law, and here, I am of the opinion that the appeal of the Attorney General of Quebec is not based on a pure question of law, but on a mixed question of law and fact. The Court of Queen's Bench was not satisfied with the findings of the learned trial judge, particularly that the proof of identification and some other facts, while creating an atmosphere of suspicion, did not meet the test to which all circumstantial evidence must be put. Both Courts had to weigh the evidence. The trial judge found that there was direct and circumstantial evidence against the accused, sufficient to find him guilty of the offence as charged. The Court of Queen's Bench found that there was not.

In view of the decision of this Court in *The King v. Wilmot*[1], it may be contended that this Court has no jurisdiction on the further ground that the accused having been found guilty by the Court of Queen's Bench of receiving stolen goods, was not acquitted within the meaning of s. 598 of the *Criminal Code*. He was of course acquitted of robbery, but found guilty of a different offence. However, in view of my conclusion that we are not faced with a pure question of law, it becomes immaterial to discuss this point any further.

Fergusson's appeal is therefore allowed, and the order of the Court of Queen's Bench and the conviction are set aside. The appeal of the Attorney General is quashed for want of jurisdiction.

Appeal of accused allowed;

Appeal of Attorney-General quashed.

Attorney for the Attorney-General: J. Trahan, Montreal.

Attorney for the accused: R. Daoust, Montreal.

[1] [1941] S.C.R. 53, 75 C.C.C. 161, 1 D.L.R. 689.