1948

*Feb. 19, 20.
*Apr. 13.

BENJAMIN LOPATINSKY.....(APPELLANT);

AND

HIS MAJESTY THE KING.....(RESPONDENT).

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Criminal law—Evidence of accomplice—Corroboration—Nature of evidence required for corroboration—Circumstantial evidence—Recent possession—Remarks of trial Judge in passing sentence—Cr. Code s. 1002, 1014—Charge of retaining stolen goods under Cr. Code s. 399.

The Court of Appeal for Alberta affirmed the conviction of the appellant who had been found guilty by a judge, presiding without a jury, of retaining in his possession, knowing them to have been stolen, sixteen tires, the property of the Government of Canada. These tires were stolen from the R.C.A.F. in Edmonton by one L.A.C. Ward. The accused agreed to sell them for Ward and they were delivered by Ward to the accused at the Low Level Service Station in Edmonton in a truck bearing the letters R.C.A.F. on the door. The six tires sold by the accused were recovered and all the others were recovered either at his house or at the service station.

Held: This was not a conviction on the uncorroborated evidence of an accomplice.

Held: The conduct of the accused and the circumstances under which he received and disposed of the tires established his guilt, and even if the trial judge's direction lacked that precision which the law contemplates, no substantial wrong or miscarriage of justice had occurred under section 1014 Cr. Code.

*PRESENT: Taschereau, Rand, Kellock, Estey and Locke JJ.

Held: The remarks made by the trial judge in the course of his passing sentence, even if he had them in mind when considering his verdict, would not, in the circumstances, warrant a setting aside of the conviction.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division, affirming (Ford and Macdonald JJ. A. dissenting) the conviction of the appellant on a charge of retaining in his possession, knowing them to have been stolen, sixteen tires, the property of the Government of Canada, contrary to section 399 of the Criminal Code.

The material facts of the case and the questions in issue are stated in the judgment now reported.

A. W. Beament, K.C. for the appellant.

H. J. Wilson, K.C. for the respondent.

The judgment of the Court was delivered by

ESTEY J.:—The accused was convicted before a judge presiding without a jury of retaining in his possession, knowing them to have been stolen, sixteen tires, the property of the Government of Canada. The Appellate Division in Alberta affirmed the conviction, Ford and Macdonald, JJ. A., dissenting.

The first ground of dissent is that the learned trial Judge misdirected himself by disregarding the rule of practice that it is dangerous to convict upon the uncorroborated evidence of an accomplice.

It must be conceded that LAC Ward as a witness was in relation to the accused an accomplice. He deposed that on September 16, 1947, he and two others stole the tires from the R.C.A.F. in Edmonton, that on the same day he made an arrangement with the accused to sell the tires for them, and delivered the tires to him at the Low Level Service Station in Edmonton. *Rex* v. *Robinson* (1); *Rex* v. *Galsky* (2); *Rex* v. *Joseph* (3).

The accomplice is a competent witness but his implication in the crime and the possible motives that may

(1) (1864) 4 F. & F. 43.
(2) 67 C.C.C. 108.
(3) 72 C.C.C. 28.

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influence him in giving his evidence are such that it is dangerous to found a conviction thereon unless it be corroborated. It need not be corroborated, however, in every detail. It is sufficient if there be found corroboration of a material fact in independent evidence which implicates the accused in the commission of the crime.

In *Rex* v. *Baskerville* (1), Lord Reading, C.J., in delivering the judgment of the Court of Criminal Appeal in England reviewed the authorities upon the corroboration of the evidence of an accomplice and stated in part at p. 667:

> We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.

This Court in *Hubin* v. *The King* (2), followed *Rex* v. *Baskerville* (1) and stated at p. 444:

> The corroboration must be by evidence independent of the complainant and it "must tend to show that the accused committed the crime charged."

In *Regina* v. *David Birkett* (3), the accused was found guilty of receiving sheep knowing that they had been stolen. One of the two persons involved in the theft deposed as to the theft and of the delivery of one of the sheep by the other party involved in the theft to the accused who had taken it into the house where he and his father lived. Evidence as to the finding of a quantity of mutton in that house, which had formed parts of two sheep corresponding in size with those stolen, and the finding of the skins in the same place constituted corroboration. This case was approved in *Rex* v. *Baskerville* (1).

Against the accused the Crown did not rely entirely upon the evidence of Ward but called as witnesses Taylor, the investigator, and Congdon who purchased six of the tires from the accused.

Flight Sergeant Taylor, R.C.A.F. investigator, on September 19th located some of these tires at the Low Level Service Station. He then located the accused and with

(1) (1916) 2 K.B. 658.
(2) [1927] S.C.R. 442.
(3) (1839) 8 C. & P. 732.

him went to the latter's house where three of the tires were recovered. Then they went to the Low Level Service Station where six more tires were recovered. Finally they went to Congdon's Transfer where six more were recovered. The manner in which these tires were recovered leaves no doubt but that they were the tires that two days before the accused had received from Ward.

Moreover, before or on the morning of the 18th some of these tires were removed from the Low Level Service Station to the home of the accused. On that morning, Congdon deposed, the accused offered for sale some tires which he inspected at the home of the accused. That afternoon the accused took six of the tires (four new 900 x 20 and two used of the same size) to Congdon's Transfer where a sale was concluded of these tires for $300, approximately one-half of their market value.

The foregoing evidence of Taylor and Congdon corroborates that of Ward, both as to the place of delivery of the tires, and the fact that the accused had received and retained them for the purpose of effecting a sale. This is not, therefore, a case in which a conviction has been made upon the uncorroborated evidence of an accomplice. Moreover, neither this corroborative nor any other part of the evidence was contradicted.

The learned Judges who dissented were also of the opinion that the learned trial Judge disregarded the rule of law as to the effect of circumstantial evidence. This rule is set forth in the oft quoted passage in *Hodge's Case* (1), where, in addressing the jury, Alderson, B., stated that they must be satisfied:

> . . . not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person.

The accused was first approached with regard to these tires by LAC Stubbart, who met the accused on the 17th at the Low Level Service Station and as to that he stated:

> When I got there I met Mr. Lopatinsky and asked him if he was still interested in tires; he said he would like to see them.

Stubbart denied any knowledge of the theft but why he was associating himself in the matter was left entirely a

(1) (1838) 2 Lewin C.C. 227 at 228.

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matter of conjecture. Stubbart then waited at the Low Level Service Station until Ward, driving a truck, arrived with the fifteen tires. This truck had the letters "R.C.A.F." on the doors. Stubbart introduced Ward to the accused and a conversation followed between them which Stubbart did not hear. Ward deposed that he asked the accused "if he could sell the tires for me or buy them himself", to which the accused replied "he couldn't buy them himself, he didn't have the money; he said he would try and sell them for me". While the accused looked or glanced at the tires as they remained in Ward's truck, he did not examine them, but as a result of the conversation these tires were removed by Ward, Stubbart and another airman, from the truck driven by Ward, and placed in part into another truck at the service station and in part into the service station. These fifteen tires were of different sizes, 1100 x 20, 1000 x 20 and 900 x 20, some were retreads and some were new. Ward said he would like to get $600, and that appears to be all that was said about the price. No questions were asked with regard to where these tires came from. In cross-examination Ward did depose that the accused had inquired about a bill of sale but accepted a statement that they would try to give him one later. On that date the accused advanced to Ward $100 and the next day he gave Stubbart $50, which Stubbart handed to Ward.

It is not suggested that any of the parties were engaged in the business of selling tires nor was the transaction itself conducted as one in the normal course of business. From the moment Stubbart met the accused and asked "if he was still interested in tires", the matter proceeded with a minimum of conversation and an absence of discussion as to Ward's acquisition of the tires, the use and condition of the tires and the value of them or other items that normally enter into such a transaction.

Under these circumstances, the disposition of the tires at approximately one-half of their market value is significant. It was this fact, or it together with the other circumstances that caused Congdon to take the serial numbers of these tires and before concluding the purchase to communicate with the police and ascertain if these tires were listed as stolen.

Throughout the evidence of both Taylor and Congdon there is no suggestion that any explanation was offered on the part of the accused as to the circumstances under which he was in possession of these tires which had been stolen but two or three days prior thereto.

The evidence of guilty knowledge in this as in so many cases is not directly deposed to. The unexplained fact of recent possession is evidence thereof.

Rex v. *Schama* (1).

Wills on Circumstantial Evidence, 7th Ed., 93.

Taylor on Evidence, 12th Ed. sec. 140.

In this case, however, the Crown had not relied upon the mere fact of recent possession but has adduced evidence of conduct upon the part of the accused, both with respect to his reception and disposition of the tires and as to the sale of a portion thereof. These facts were all adduced in evidence and no explanation tendered in regard thereto. As disclosed in this record they admit of no doubt as to the guilt of the accused.

The learned trial Judge did not record the reasons upon which he founded his verdict of guilty and it may be that he did not direct himself upon the foregoing points with that precision which the law contemplates. However, the facts and circumstances of this case are such that no substantial wrong or miscarriage of justice has actually occurred within the meaning of section 1014 of the *Criminal Code.*

The other ground of dissent was based upon the learned trial Judge's reference to the thieves as "children" and that the accused was a "garageman". All of the parties were before him and while there is no evidence as to their respective ages, it was open to him to form his opinion. The evidence indicates that the accused was driving a truck. But what interest or association if any he had with the Low Level Service Station is left a matter of conjecture. It was there he received delivery of the tires on September 17th, and six of them were recovered from that station on the 19th by Flight Sergeant Taylor. These remarks were made by the learned trial Judge in the course

(1) (1914) 11 C.A.R. 45.

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of his passing sentence upon the accused, but even if he had them in mind when considering his verdict they would not, in the circumstances, warrant a setting aside of the conviction.

The appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant: *Cairns, Ross, Wilson & Wallbridge.*

Solicitor for the respondent: *H. J. Wilson.*