## R. v. TITUS CHIMWELEH.

A CRIMINAL REVIEW CASE OF 1933.

*Penal Code section* 286 (1)—*receiving or retaining stolen property—distinction in nature of the two offences—reference for opinion of High Court on a point of law—power to convict where part of offence is not proved but the part proved amounts to another offence.*

The accused was charged with receiving stolen property under section 286 (1) of the Penal Code; the evidence showed that the accused had received the property innocently but that subsequently, after learning that the property had been stolen, he retained possession.

Section 286 (1) of the Penal Code reads:

> " 286. (1) Any person who receives or retains any chattel, money, valuable security or other property whatsoever, knowing or having reason to believe the same to have been feloniously stolen, taken, extorted, obtained or disposed of, is guilty of a felony, and is liable to imprisonment for seven years."

The Magistrate being in doubt as to the meaning and effect of the word " retain " referred the question for the opinion of the High Court.

The High Court held that, under the circumstances, there had been a clear retention of the property after guilty knowledge had commenced and that this constituted " retaining " within the meaning of section 286 (1) of the Penal Code.

A further question was considered by the High Court, viz., whether on a charge under section 286 (1) of the Penal Code of " receiving " the accused could be convicted of " retaining " although not charged with the latter offence. The High Court decided that by virtue of the power conferred by section 82 of the Magistrates' Courts Ordinance (Cap. 4), the Court could so convict and directed accordingly.

Section 82 of the Ordinance in question (since repealed) read:

> " Where a person is charged with an offence and part of the offence is not proved but the part which is proved amounts to a different offence he may be convicted of the offence which he is proved to have committed although he was not charged with it."

The Magistrates Courts Ordinance (Cap. 4) was repealed and section 82 of that Ordinance was repeated in section 169 of the Criminal Procedure Code. This section was in turn repealed by Ordinance 28 of 1940 and the relevant section is now section 168 of the Criminal Procedure Code which reads thus:

> " 168. (1) When a person is charged with an offence consisting of several particulars a combination of some only of which constitutes a complete minor offence and such combination is proved but the remaining particulars are not proved he may be convicted of the minor offence although he was not charged with it.
>
> (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

As retaining stolen property could not be said to be a minor offence in relation to receiving stolen property (see *R.* v. *Mumbi Chilao* 5 N.R.L.R. 459) it would seem that the dictum in the penultimate paragraph of the present judgment is no longer law.

The present case was referred to in *Solomon* v. *The Queen* 1957 R. & N. 600, in which case SOMERHOUGH, J. outlines the distinction between " receiving " and " retaining " property knowing it to have been stolen.

Hall, J.: Section 411 of the Indian Penal Code commences:

> " Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property."

It will be seen that the wording of section 411 *supra* is very similar to section 286 (1) of the Penal Code of Northern Rhodesia.

In the footnote to the aforesaid section 411 under the heading " Dishonestly receives or retains any stolen property " the following appears:

> " To constitute dishonest retention, there must have been a change in the mental element of possession—possession always subsisting *animo et facto*—from an honest to a dishonest condition of the mind in relation to the thing possessed. A simple illustration is the case of a pawn-broker who receives property in pledge honestly, and subsequently discovering it to be stolen, notwithstanding mentally resolves to keep it for his own benefit. In the absence of any act amounting to misappropriation or conversion of the property to his own use, the pawn-broker could not be convicted under section 403 of criminal appropriation, but he might be held to have committed the offence of dishonestly retaining under section 411." (Najiballa Khan (1884), P.R. No. 18 of 1884, pp. 31, 32.)

" Thus a person cannot be convicted of ' receiving ' if he had no guilty knowledge at the time of receipt. But he is guilty of ' retaining ' if he subsequently knows or has reason to believe that the property was stolen. The offence of dishonest retention of stolen property may be complete without any guilty knowledge at the time of receipt.

But in order to support a conviction of dishonestly retaining stolen property, it ought to be shown that the accused, being in innocent possession of the property, acquired the knowledge that it was stolen, and thereafter retained it dishonestly."

The dicta in paragraph 3 hereof appear to cover the facts as put before me in the present case.

Section 82 of Chapter 4 reads:

" Where a person is charged with an offence and part of the charge is not proved but the part which is proved amounts to a different offence he may be convicted of the offence which he is proved to have committed although he was not charged with it."

I am of opinion that section 82 aforesaid would cover a conviction for " retention " in the present case, although the accused was only charged with " receiving ".

I accordingly affirm the sentence of two months imprisonment with hard labour.