

R. v. KASWAKA JACK.

CRIMINAL REVIEW CASE NO. 259 OF 1939.

Penal Code section 271 (2)—theft and breaking out of dwelling-house—recent possession of stolen property—alternative conviction of receiving.

Where the only evidence is that the accused was found in possession of a portion of the stolen property this is not necessarily sufficient to support a conviction under section 271 of the Penal Code. Section 171 of the Criminal Procedure Code has been repealed and replaced by section 174 (1) (a).

But see *R. v. Loughlin* 35 Cr. App. Rep. 69, which is authority for the proposition that where it can be proved that premises have been broken into and property stolen therefrom, and very soon after the breaking the accused has been found in possession of that property, it is open to the Court to find the accused guilty of breaking and entering and, if he is, it is inconsistent to find him guilty of receiving because a man cannot receive from himself.

Robinson, A.C.J.: I do not think the evidence in this case is sufficient to support a conviction *contra* section 271 (2) Penal Code. There is no evidence at all to connect the personal presence of the prisoner inside the house.

Mr. Jones' house at Broken Hill was broken into on Sunday, 24th September, between 7.30 and 8.30 p.m. I think two sheets, two blankets and a quilt were stolen. The evidence is not very clear.

On Tuesday, 26th September, the prisoner (I think) was arrested and a blanket was found in his hut on a nearby farm.

The blanket was identified as one of the stolen ones. The rest of the property has not been found.

On that evidence the Court is asked to say that it is satisfied beyond reasonable doubt that it was the prisoner and nobody else who broke out of the house and stole all the missing articles on the previous Sunday. It is too big an assumption.

The evidence in my opinion is sufficient to support a conviction for receiving stolen property, section 286 (1) Penal Code, i.e., one blanket, on the theory of recent possession.

It is quite possible, for instance, that the house boy gave the prisoner the stolen property. The "recent possession" coupled with the rest of the evidence would also be good grounds for saying that the prisoner had stolen the blanket, but I do not think a Court can go further than that and find the prisoner also guilty of the very serious crime of burglary and of having stolen other articles, not produced, as well.

Section 171 Criminal Procedure Code permits me to alter the conviction. I, therefore, quash the conviction *contra* section 271 (2) Penal Code and section 243 Penal Code and substitute therefor a conviction *contra* section 286 (1) Penal Code.

Under the new circumstances, I reduce the sentence to one of nine months I.H.L. and I approve the recommendation for deportation within the Territory for a period of three years.