[HIGH COURT OF AUSTRALIA.]

LILLIECRAP AND ANOTHER v. THE KING.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1905.

SYDNEY, *September* 4.

Griffith C.J., Barton and O'Connor JJ.

Special verdict—"Illegally using"—Precise words of Statute not followed—Offence substantially described—Crimes Act (N.S.W.), (No. 40 of 1900), secs. 130, 131—Special leave to appeal—Decision obviously right.

Sec. 130 of the *Crimes Act* 1900 provides that on the trial of a person for stealing cattle, the jury, if they are not satisfied that the accused is guilty of that charge, but are satisfied that he is guilty of an offence under sec. 131 of the Act, that is, of taking and working or otherwise using cattle the property of another person without the consent of the owner, may acquit the accused of the offence charged and find him guilty of the other offence, and he shall be liable to punishment accordingly.

The applicants were charged with stealing cattle, and also with feloniously receiving cattle knowing them to have been stolen. The Judge explained to the jury the verdict which they were entitled to return under secs. 130, 131, describing the offence in the latter section as "illegally using." The jury acquitted the prisoners of the offences charged, and found them guilty of "illegally using."

The Supreme Court having, on a special case stated, sustained the conviction on the ground that the verdict returned was a substantially accurate description of the offence created by sec. 131, the High Court, being of the opinion that that decision was obviously right, refused to grant special leave to appeal.

Special leave to appeal from the decision of the Supreme Court, *R.* v. *Lilliecrap and another*, 22 N.S.W. W.N., 125, refused.

MOTION for special leave to appeal.

The applicants were charged at Quarter Sessions under an information containing counts for stealing cattle, and for feloniously receiving cattle knowing them to have been stolen. The jury were told by the Crown Prosecutor in his address, and also

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by the presiding Judge in his summing up, that if they were of the opinion that the cattle had not been stolen by the accused, but had been unlawfully used by them without the consent of the owners, they might find a verdict of "illegally using." The Judge explained to the jury both the elements of the offence defined in sec. 131, *i.e.*, the taking and the using, without the consent of the owners. The jury acquitted the accused of stealing and of receiving, but found them guilty of "illegally using." The attorneys for the prisoners then took the point that the verdict of "illegally using" was a nullity. Certain other points were taken, which are not material to this report, and a special case was stated for the opinion of the Supreme Court on the point mentioned as well as on the others. That Court held that the verdict, although it was not technically correct, was in the form commonly used to denote the offence defined in sec. 131, and was a substantially accurate description of it. The other points being decided against the prisoners, the conviction was sustained: *R.* v. *Lilliecrap and another* (1).

The present application was for special leave to appeal from that decision.

Garland, for the applicants. Where a special verdict is returned, it is necessary that the jury should state in their finding all the essential elements of the offence of which they intend to convict the accused. If they do not clearly state these matters, it is impossible to say whether they have really considered them all and found them against the accused. There should be no uncertainty in the verdict. If the words used are consistent with innocence, *i.e.*, are capable of meaning something which is no offence in law, the verdict is bad. Although in *R.* v. *Hall*, reported in *Addison's Digest of Criminal and Magistrates' Cases*, p. 303, it was held that a verdict of "receiving" was a valid one, there are later cases inconsistent with that decision. An information which does not allege intent, where intent is a necessary ingredient of the offence, is bad: *R.* v. *O'Hearn* (2), and the finding of the jury must set out substantially all the matters which would have to be stated in the information. They should follow

(1) 22 N.S.W. W.N., 125.

(2) 11 S.C.R. (N.S.W.), 264.

the terms of the section empowering them to return the particular verdict. Here both a "taking" and a "using" were essential.

[O'CONNOR J.—Have not the words "illegal using" been so commonly used that they have almost acquired a technical meaning to indicate the particular offence mentioned in sec. 131?]

Even if so, that would not be sufficient. This particular jury may not have so understood them. It was held that a verdict of "unlawfully wounding" was not a proper verdict under sec. 35, which makes "maliciously wounding" an offence: *R.* v. *Lee* (1). The presiding Judge should see that the verdict is returned in a form known to the law. The words of the section should be read over, or the special count referred to in order that the jury might give their assent.

GRIFFITH C.J. The point taken in this case is a very simple one. The prisoners were charged with larceny and with receiving. Under the Statute a person charged with larceny may be convicted of an offence under sec. 131, *i.e.*, of taking and working or otherwise using cattle the property of another person without the consent of the owner or person in lawful possession thereof, and may be punished accordingly. At the trial of the prisoners the learned Judge in his summing up told the jury that they could find the accused guilty of stealing or of receiving, or, if they thought that the cattle were only taken for the purpose of using them, they might find a verdict of "illegally using." The jury acquitted the accused of stealing and of receiving, and found them guilty of "illegally using." The objection taken is that the verdict ought to have been returned in the terms of the section, *i.e.*, guilty of "illegally taking and using" the cattle in question. A special case having been stated, it was argued before the Supreme Court that in a special verdict the jury must use the precise words of the section describing the offence. But that Court took the common sense view that it is quite sufficient if the words used in the oral verdict are those commonly used to describe the particular offence. It is not disputed that the words used were those under which this offence is commonly known. The Supreme Court followed the case *R.* v. *Hall*,

(1) 15 N.S.W. L.R., 445.

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Addison's Digest of Criminal and Magistrate's Cases, p. 303, which was decided in 1874 by *Sir James Martin* C.J., *Faucett* and *Hargrave* JJ. In that case the accused was charged with stealing and receiving, and the jury returned a verdict of guilty of receiving, omitting the words "feloniously" and "well knowing the same to have been stolen." The Supreme Court held that that verdict was a valid one, and sustained the conviction.

I cannot help thinking that in this case the point is not seriously arguable. It is, at best, a point of a purely technical character, not in any way touching the merits. I think that the case which was followed by the Supreme Court was rightly decided. Being of opinion, therefore, that the decision sought to be appealed from is obviously right, I think that special leave to appeal from it should be refused.

BARTON J., and O'CONNOR J., concurred.

Leave refused.

Solicitor, for applicants, *J. F. Thomas*, by *Wilkinson & Osborne.*

C. A. W.

Cons *Pyke v Duncan* [1989] VR 149

Cons *Ward, Re; Official Trustee v Dabnas Pty Ltd* 3 FCR 112

Foll *Burns Philp Trustee Co Ltd v Ironside Investments Pty Ltd* [1984] 2 QdR 16

Cons *Kastropil, Re; Ex parte Official Trustee v Kastropil* (1989) 33 FCR 135

Cons *Ward, Re; Ex parte Official Trustee v Dabnas Pty Ltd* (1984) 55 ALR 395

Cons *Griffiths v R* (1994) 76 ACrimR 164

Appl *Richard Walter Pty Ltd v Comr of Taxation* (1996) 33 ATR 97

Foll *Official Trustee in Bankruptcy v Alvaro* (1996) 138 ALR 341

Foll *Kastropil, Re; Ex parte Official Trustee in Bankruptcy* (1989) 109 ALR 568

Foll *Edwards v R* (1993) 68 ACrimR 349

Appl *R v Cassell* (1998) 45 NSWLR 325

[HIGH COURT OF AUSTRALIA.]

JACK . . . . . APPELLANT;

AND

SMAIL AND ANOTHER . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1905.

MELBOURNE, *August* 8, 9, 10, 11, 14, 15, 16.

Griffith C.J., Barton and O'Connor JJ.

Insolvency Act 1890 (*Victoria*) (*No.* 1102), *secs.* 70 (v.), 72—*Insolvency Act* 1897 (*Victoria*), (*No.* 1513), *sec.* 5—*Married Women's Property Act* 1890 (*Victoria*), (*No.* 1116), *secs.* 10, 13—*Court of Insolvency—Jurisdiction—Application to declare trustee entitled to property adversely claimed—Burden of proof—Savings of wife out of housekeeping allowance by husband—Deposit in Savings Bank—Settlement—Grocer's licence—"Goods and chattels"—Reputed ownership.*

The Court of Insolvency has jurisdiction under the *Insolvency Act* 1897 to entertain an application by the trustee of an insolvent estate for a declaration that property claimed by a third person to which the trustee sets up a title paramount is part of the insolvent estate.