

[HIGH COURT OF AUSTRALIA.]

SCHIFFMANN APPELLANT;
 DEFENDANT,

AND

THE KING RESPONDENT.
 PROSECUTOR,

ON APPEAL FROM THE SUPREME COURT OF
 VICTORIA.

Appeal from the Supreme Court—Special leave—Criminal matter—Larceny— H. C. OF A.
Receiving—Recent possession of stolen goods—Evidence to go to jury. 1910.

MELBOURNE,
 Sept. 2.
 Griffith C.J.,
 Barton and
 O'Connor JJ.

On a charge of stealing several kegs of cream of tartar, the property of the Victorian Railways Commissioners, and, on a second count, of receiving the kegs knowing them to have been stolen, the evidence showed that out of a large consignment of kegs of cream of tartar in the possession of the Commissioners three kegs were missed, that all the other kegs bore certain shipping marks on the lids, that shortly afterwards two kegs of cream of tartar, similar in size, shape, colour and dimensions to the rest of the consignment, and bearing marks on the lids such as would be produced by planing off the shipping marks, were found in the shop of the accused, who before they were found denied that she had them and afterwards gave no reasonable account of how they came into her possession. The accused having been convicted of receiving, the Full Court of the Supreme Court held that there was evidence to go to the jury that the goods found in the possession of the accused formed part of the goods alleged to have been stolen.

Held, that the case was not one for granting special leave to appeal.

Trainer v. The King, 4 C.L.R., 126, distinguished.

Special leave to appeal from the decision of the Supreme Court : *Rex v. Schiffmann*, (1910) V.L.R., 348 ; 32 A.L.T., 28, refused.

H. C. OF A. MOTION for special leave to appeal from the Supreme Court of
1910. Victoria.

SCHIFFMANN Margaretha Schiffmann and Charles Brown were presented
v. before the Court of General Sessions, at Melbourne, on the first
THE KING. count, for that at Melbourne on or about 18th March 1910 they feloniously did steal, take and carry away several kegs of cream of tartar, of the goods and chattels of the Victorian Railways Commissioners; and on the second count, for that at the same time and place they feloniously did receive the goods and chattels mentioned in the count, knowing them to have been stolen.

Evidence was given to the following effect:—Between 11th and 15th March 419 kegs of cream of tartar, each weighing about 100 lbs., were received by the Victorian Railways Commissioners from a ship either at Port Melbourne or at the Victoria Dock, Melbourne, were put on trucks and forwarded to the shipping shed. Between 14th and 18th March 408 of these kegs were delivered out to consignees and 8 remained in the shed, leaving 3 not accounted for. The kegs other than those not accounted for bore on the top lid the shipping mark W. S. & Co., but there was no evidence as to whether those not accounted for bore any brand. On 22nd March two police officers went to the shop of the prisoner Schiffmann—a small general store—at Bay Street, Port Melbourne. In answer to their questions she said that the only cream of tartar she had was one keg three parts full, which she pointed out. On a search being made by the officers they found, covered over with bags of grain and boxes, two full kegs of cream of tartar similar in size, shape, colour and dimensions to those received by the Commissioners, and on the lids of each of them were marks of obliteration by chiselling or planing where the shipping marks usually appeared. Schiffmann on being further questioned gave no explanation of where any of the three kegs came from, and produced no receipt for them.

On 23rd March two police officers went to the shop of the prisoner Brown—a grocer's and hay and corn shop—in South Melbourne. On being questioned he said that all the cream of tartar he had was "a few pounds somewhere," and, being asked to point it out, he pointed out a bag, saying "that bit there."

The bag contained about 96 lbs. of cream of tartar and the cotton lining of a cream of tartar keg, but Brown said he never had a keg. In the yard adjoining the shop was found a broken-up keg which had contained cream of tartar, but the lid of which was missing. Near to the broken up keg was an axe, and on the end of the handle a coat was hanging, which Brown afterwards put on. No satisfactory account was given by Brown to the officers of how the cream of tartar or the keg came into his possession, and he afterwards tried to bribe one of the officers not to prosecute him. There was evidence that thousands of kegs of cream of tartar similar in size, shape, colour and dimensions to those in the particular shipment had passed through the hands of the Commissioners' servants.

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The prisoners having been convicted on the second count for receiving, the Chairman of the Court stated a case for the Supreme Court, asking whether there was evidence to go to the jury that the goods found in the possession of the prisoners respectively formed part of the goods alleged to have been stolen from the Commissioners. The Full Court (*à Beckett* and *Hood J.J.*, *Cussen J.* dissenting) answered the question in the affirmative: *Rex v. Schiffmann and Brown* (1).

A motion was now made to the High Court on behalf of the prisoner Schiffmann for special leave to appeal from this decision so far as she was concerned.

Cussen, for the appellant. There was no evidence of the identity of the goods found in the prisoner's possession with those which were missed, but only of similarity. The case is on all fours with *Trainer v. The King* (2).

[GRIFFITH C.J.—No. If in *Trainer v. The King* (2), the possession of the sheep had been laid in some particular person who had recently missed sheep similar to those found in the possession of the prisoner, and it had been proved that the sheep so found had their ears mutilated so as to obliterate any ear-marks that might have existed, then that case would have been more like the present one.]

(1) (1910) V.L.R., 348; 32 A.L.T., 28. (2) 4 C.L.R., 126.

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The question whether there was any evidence to go to the jury is one of law, and if there was not, there has been a violation of a principle of natural justice. There are conflicting decisions in Victoria as to the effect of evidence of similarity between goods missed and goods subsequently found in the possession of persons who cannot account satisfactorily for that possession.

[O'CONNOR J.—No general rule can be laid down as to when proof of similarity amounts to proof of identity.

GRIFFITH C.J.—If special leave to appeal were granted in this case it might be granted in any case of circumstantial evidence.]

Per curiam. It is impossible to bring this case within the rule which has so often been laid down by this Court. Special leave to appeal will be refused.

Special leave to appeal refused.

Solicitor, for the appellant, *J. S. Mornane.*

B. L.

Appl
Davis v
B 92 FLR

Appl
Russell v
Ayres 71
LR 480

Appl
Morrisey v
Conaust Ltd
(1991) 77
NTR 19

ns
Customs, C-G
v Kawasaki
Motors Pty Ltd
(1991) 103
LR 637

Appl
Morrisey v
Conaust Ltd
(1991) 1
NTR 183

Refd to
Sretton v
Malika
Holdings Pty
Ltd [1999] 2
VR 38

Appl British
American
Tobacco Aust
v Western
Australia
(2003) 53
ATR 698

pl
Isara Pty
(in liq),
DCT v
Isara Pty
(1992)
FLR 235

Dist
Common-
wealth v
Precision
Pools Pty Ltd
(1994) 29
ATR 335

Dist
Hillig v DCT
(2001) 2 QdR
147

Dist
Hillig v DCT
(2000) 158
FLR 226

ons
Aerolineas
argentinas v
Federal
Imports Corp
(1995) 63
CLR 100

Refd to
Vanmald Pty
Ltd v Fairfield
CC (1995) 101
LGERA 297

[HIGH COURT OF AUSTRALIA.]

SARGOOD BROTHERS PLAINTIFFS;

AND

H. C. OF A.

1910.

THE COMMONWEALTH AND ANOTHER DEFENDANTS.

MELBOURNE,
June 2, 7, 8;
Sept. 12.

Griffith C.J.,
O'Connor,
Isaacs and
Higgins JJ.

Customs duties—Duties collected under proposed tariff—Proposed tariff different from tariff enacted—Right to recover money paid for duty—Voluntary payment —“Dispute” as to duty—Value of goods for purpose of duty—Outside packages containing goods dutiable ad valorem—Customs Act 1901 (No. 6 of 1901), secs. 154, 167, 226—Customs Tariff 1902 (No. 14 of 1902), sec. 6, Schedule A—Customs Tariff 1908 (No. 7 of 1908), secs. 3, 4, 5, 7, Schedule A—The Constitution (63 & 64 Vict. c. 12), sec. 55.