Counsel submits that fresh facts have come into existence since the Court gave conditional leave; further that, if these facts had been previoulsy before the Court, it would not have granted conditional leave. Counsel asks leave to put in an affidavit and upon the new facts therein appearing to request the Court to refuse final leave to appeal and rescind its order for conditional leave.

By its previous order this Court gave the appellant leave to appeal to the Privy Council upon certain conditions. When these conditions have been complied with the leave becomes operative and the appellant is entitled to a final order. We are unanimously of opinion that the words "any reason" in the passage cited from Bentwich are intended to have reference solely to reasons connected with the carrying out of the conditional order, *e.g.*, an irregularity in procedure or a failure to carry out any of the requirements of that order, and do not allow objections to be raised on other grounds to the granting of final leave.

Final leave to appeal granted.

[STRONGE, C.J., THOMAS AND FUAD, JJ.]

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NEOCLIS HARALAMBOUS & STEFANIS YANNI.

Criminal Law—Possession of property reasonably suspected of being stolen—Cyprus Criminal Code, Section 297—Elements of offence—What must be proved to establish.

The appellants were convicted of being in possession of an ox reasonably suspected of being stolen. They sought to set aside the conviction on the ground that there was no evidence of larceny, nor *animus furandi*.

Held: (1) no evidence of larceny is necessary. Section 297 requires proof (*a*) that the accused was in possession of the property; (*b*) that a person other than the accused suspected that the property was stolen; (*c*) that the grounds for this suspicion were reasonable; and upon proof of these three matters, the accused is guilty of a misdemeanour, unless he satisfies the Court that he acquired possession lawfully.

(2) the words "reasonably suspected of being stolen property" in Section 297 refer *not* to any suspicion of the property being stolen which the person in possession of it might have, but to a suspicion entertained by some one else, *e g.*, the person who finds or sees it in his possession;

(3) matters to be proved to establish a charge under Section 297 are not the same as on a charge of larceny;

(4) a prosecution under Section 297 will not lie where either before or upon charging the accused it is known that certain property has been stolen, and that the property found in possession of the accused is that same property or part of it.

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The opinion of the Court in *R.* v. *Togli Nicola* (1), that the measure of evidence on a charge of being in possession of property reasonably suspected of being stolen is the same as on a charge of stealing or receiving, dissented from.

Philippou for appellants.

Pavlides, Crown Counsel, for the Crown.

Philippou: Section 297 of the Code is a copy of Section 20 of Law 1 of 1886 which has been interpreted in *R.* v. *Georghi Yannako Pola* (2). The proof required is the same as in a case of larceny where there must be *animus furandi* *R.* v. *Farnborough* (3).

There is no evidence that the animal was stolen. Conviction founded on fact that the appellants did not satisfy the Court that they came by the animal lawfully. Submit that the accused had no burden upon them to show that their possession was lawful. Court found that there was no sufficient evidence to convict for larceny; I, therefore, submit on the authority of the two cases cited that where the evidence is not sufficient to establish larceny, there can be no conviction upon a charge under Section 297.

Pavlides: Under the section on which the appellants were convicted it is not necessary for the Prosecution to prove that the appellants came into possession of the ox unlawfully. Nor does Section 297 require proof of *animus furandi*. The two cases referred to, *R.* v. *Togli Nicola* (1) and *R.* v. *Georghi Yannako Pola* (2) are contradictory.

In reply to a question from the Court, Crown Counsel submitted that the words "reasonably suspected of being stolen property," in Section 297 refer to a suspicion in the mind of the person in whose possession the goods are found.

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JUDGMENT:—

STRONGE, C.J.: This is an appeal against a decision of the Magisterial Court, Paphos, by which the appellants were convicted of being in possession on the 21st of September, 1933, of an ox reasonably suspected of being stolen contrary to Section 297 of the Criminal Code of 1928. For the appellants Mr. Loizos Philippou contended that there was no evidence of any larceny of the ox. That even, if possession by the appellants was proved, which it was contended was not the case, there was no *animus furandi* as the intention was ultimately to return the ox to the complainant. There are in the Cyprus Law Reports two cases *R.* v. *Togli Nicola* (1) and *R.* v. *Kalla* (2) dealing with Section 20 of the Common Law and Procedure Amendment

(1) 8 C.L.R. 5.
(2) 9 C.L.R. 13.
(3) (1895) 2 Q.B. 484.

Law, 1886, a section identical in wording with Section 297 of the Criminal Code, 1928, which replaced it. In neither of these two cases, however, does the decision as reported definitely state what matters have to be proved on the hearing of a charge under the section or by whom the suspicion that the property has been stolen is to be entertained. As doubts still appear to exist on these points a careful consideration of the object and meaning of Section 297 is, in my opinion, advisable as being likely to be of assistance in resolving these doubts. It will, I think, also be of service to direct our attention in the first place to the provisions of Section 294 in order to distinguish clearly between the matters proof of which is essential on a charge under that section and the matters which must be proved on a charge under Section 297. Section 294 in effect makes *any person who receives any money or other property* knowing it has been unlawfully come by, guilty of a felony. Its general purport is the same as that of Section 91 of the (Imperial) Larceny Act of 1861 (24 and 25 Vict., c. 96) which deals with the offence colloquially known as " receiving." Upon the trial of any person for this offence it is well established law that the prosecution has to prove, first: that there was a larceny of some kind of property; secondly: that the defendant received certain property; thirdly: circumstances from which the identity of the property received by the defendant with the property stolen or with some part of such property, may reasonably be inferred; fourthly: that the defendant at the time of his receipt of the property knew it had been stolen or otherwise unlawfully come by. As to the first of these requisites, the proof that a larceny has been committed, the Court of Criminal Appeal has stated in *R.* v. *Sbarra* (1) that " the circumstances under which an accused person receives goods may in themselves prove that the goods were stolen and further may prove that the accused knew they were stolen when he received them. It is not a rule of law that there must be evidence of the theft."

As regards the fourth requisite, the guilty knowledge of the defendant, it is well settled that if it be proved that property has been stolen and has been found soon after its loss in the possession of the prisoner, such proof amounts to evidence from which the Court, in the absence of any explanation that might reasonably be true, may properly infer that he was aware at the time when he received such property that it had been unlawfully obtained (*vide R.* v. *Langmead*) (2).

(1) (1918) 26 Cox C.C. 306.
(2) 9 Cox C.C. 464.

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I come now to Section 297. Shortly stated it provides that any person who has in his possession anything which is reasonably suspected of being stolen is guilty of a misdemeanour unless he establishes to the satisfaction of the Court that his acquisition of it was lawful.

Section 294 speaks of a person receiving property *knowing* it to have been unlawfully come by. The wording of the section leaves no room for doubt as to who is the person by whom such knowledge is to be possessed. Section 297 fails to indicate with a like precision the person by whom the suspicion is to be harboured. From a footnote to *Rex* v. *Kalla* (1), it appears that Section 297 is in part adapted from Section 24 of the (Imperial) Act 2 and 3 Vict., c. 71, the wording of which is " every person who shall be brought before a metropolitan magistrate charged with having in his possession anything which may be reasonably suspected of being stolen," etc.

Similar phraseology occurs in Section 66 of the (Imperial) Act, 2 and 3 Vict., c. 47, to which 2 and 3 Vict., c. 71, is supplementary. Section 66 empowers a constable (*inter alia*) to arrest . . . . any person who may be reasonably suspected of having or conveying anything stolen or unlawfully obtained.

In *Hadley* v. *Perks* (2) the provisions of Sections 24 and 66 came up for consideration. The question to be decided was whether certain persons upon whose premises a number of sacks were found, which sacks, to use the words of the information, " were then and there and were still suspected of being stolen " had been properly convicted under Section 24. It was held they had not, inasmuch as Section 24 was merely supplementary to Section 66 and the words " *having in his possession or conveying* " in Section 24 only meant the same thing as " having or conveying " in Section 66, and as the latter section clearly dealt only with the offences of having or conveying out of doors goods reasonably suspected of being stolen, in other words, street offences, there was no power under Section 24 to convict where the goods were found in a building and not out of doors, in the street.

The following passages from the judgments in that case are, I think, material, as indicating who in the opinion of the learned Judges was the person by whom the reasonable suspicion was to be conceived.

Blackburn, J., at p. 456, deals with the powers of arrest conferred by Section 66, and after specifying the common law powers of arrest possessed by private persons and constables goes on to say: " But neither a constable nor

(1) (1909) 9 C.L.R. 13.
(2) (1866) L.R. 1 Q.B. 444.

anyone else could arrest a person merely on suspicion of his having illegally obtained goods. This is a misdemeanour and a power of arrest is given with respect to it quite beyond the common law. That power is given by Section 66 and we must look at that section to see what the power given to the constable is. Where *any person is reasonably suspected* of having or conveying anything unlawfully obtained the constable is authorized to arrest him in transit in the street." At p. 460, Shee, J., says: "Now it seems to me that Section 66 of 2 and 3 Vict., c. 47, applies only to offences or to the suspicion of offences out of doors, to street offences." At p. 461, the same learned Judge says: "Now it seems to me that Section 66 of the former Act, and Section 24 of 2 and 3 Vict., c. 71, relate only to street offences, or to the suspicion attaching to persons having in their possession or conveying things in the public streets—things which are in the view of the constable, or which in the ordinary course of the constable's employment might be brought to his notice."

Lush, J., at p. 462, says: "Power is, therefore, given to stop such person without any proof or knowledge on the part of the constable that the property is stolen, but merely on suspicion." From these passages in their judgments it seems clear that the learned Judges entertained no doubt that the words "may be reasonably suspected" referred *not* to any suspicion entertained by the person in possession of the goods, but to a suspicion conceived by some one else and that in the case before them that some one else, in view of the wording of Section 66, was the constable. The construction thus given in *Hadley* v. *Perks* to the words "which may be reasonably suspected of being stolen" affords, in my opinion, reasonable ground for giving a like construction to the words "reasonably suspected of being stolen property" in Section 297 of the Criminal Code and for holding that these words were intended to refer, *not* to any suspicion of the property being stolen which the person in possession of it might have, but to a suspicion entertained by some one else, *e.g.*, the person who finds or sees in his possession.

Now, since Section 294, which precedes Section 297, already provided for receiving goods knowing them to have been stolen, Section 297 must clearly have been intended to meet a different case, such a case as might, for instance, conceivably arise where the prosecution, although not able to prove larceny either by direct evidence of it or by evidence of the circumstances under which the accused person received the property (*R.* v. *Sbarra* (*supra*)) is, nevertheless, in a position to prove that on a given date a certain person had in his possession property which some other person reasonably suspected to be stolen property.

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For example, A is charged that on a given date at a specified place he was in possession of a gold watch and chain (or Remington typewriter or other valuable article) reasonably suspected of being stolen property. Evidence is given by B that on that date he saw in A's possession in the street (*or* in the room occupied by him) a gold watch and chain (*or* typewriter). That knowing A's circumstances in life to be such as to make it improbable that he was the lawful owner of such a valuable article he suspected it to be stolen property. Evidence is also given that the value of the article is upwards of £25. No evidence of larceny of the article is offered nor, indeed, is such evidence necessary, for the section only requires proof, first: that the accused person on the given date had the article in his possession, *i.e.*, possession as defined by Clause 5 of the Criminal Code; secondly: that a person other than the person accused suspected that article to be stolen property; thirdly: that the grounds for this suspicion were, in the opinion of the Court, reasonable.

On proof of these three matters the section casts "the special onus on the accused person" (*R.* v. *Togli Nicola* (1) of showing to the Court's satisfaction that he acquired possession of the property lawfully, and his failure or inability to do so makes him guilty of a misdemeanour for which he may be sentenced to imprisonment for any period up to 6 months. In *R.* v. *Kalla* (*supra*) the defendant was charged with being in possession of two ewes reasonably suspected of being stolen. The following were the facts:— The prosecutor missed 26 ewes. The next day a Zaptieh searching along with the prosecutor found two of the missing ewes in a flock of which the accused had charge. At the time they were so found the accused was not present. Later he returned and being asked if the two ewes were his said at once they were not. He gave three accounts prior to trial as to how the two ewes came to be in his flock. As I read them these accounts were not necessarily irreconcilable.

The sole questions, as I apprehend, which the District Court at the trial had to consider and decide were:—

(1) Were the two ewes at the time they were found, in the possession of the accused?

(2) If so, did the Zaptieh who found them suspect them to be stolen property?

(3) If he did so suspect was his suspicion a reasonable one?

If the trial Court found affirmatively on all these three questions the accused should then have been informed that the Court having come to those conclusions Section 297

(1) (1908) 8 C.L.R. 5.

(or the corresponding Section 20 of the Common Law and Procedure Amendment Law of 1886) rendered it incumbent on him to satisfy the Court that he had acquired possession of the two ewes lawfully. If, on the other hand, at the close of the case for the prosecution the Court found itself bound to give a negative answer to any one of the three questions, the accused should not have been called upon to give any explanation of how he came by the two ewes but should have been at once discharged. With great respect to the learned Judges who decided the case on appeal I find myself unable to agree with the statement which appears in their judgment that the measure of evidence on a charge for being in possession of property reasonably suspected of being stolen is the same as on a charge of stealing or receiving. In my estimation this is not so, for in the case of a charge of being in possession of property reasonably suspected of being stolen it is as already stated unnecessary to prove either directly or inferentially that any goods have actually been stolen. On a charge of larceny, however, the stealing must be directly proved and on a charge of receiving it must, as I have already pointed out, be proved either directly or inferentially. It may be, however, that in using these words the learned Judges merely meant to convey that on the hearing of a charge under Section 297 the three matters which it is incumbent on the prosecution to prove, before the defendant can be called upon to show that he acquired possession of the property lawfully, must be proved with the same amount of certainty as is required to establish on a charge of larceny or receiving, the constituent elements of either of those offences. Given such a meaning the phrase is unobjectionable, it might, however, with advantage have been differently expressed so as to convey clearly the sense intended. I also feel bound to record my disagreement with the following passage which occurs near the close of the appeal judgment:

"We do not think that the evidence was such as to justify a conviction for larceny and we think, therefore, that it was not sufficient to justify a charge under this section."

This sentence is open to the same objection as the one just referred to, viz., that it assumes that the proofs on a charge of larceny and on a charge under this section are identical and that on either charge an actual larceny must be proved.

Take as an illustration the following case: A who keeps fowl misses two of his Rhode Island Reds. B to whom A mentions his loss sees next day in C's yard—C not having any fowl of his own—feathers similar in hue to those of Rhode Island Reds. On going into C's house B sees two fowls boiling in a pot. This evidence would, in my judgment, be insufficient for the conviction of C on a charge of larceny

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of the fowl, but on a charge against C for being in possession of property reasonably suspected of being stolen, it could hardly be said that B's suspicion, that the fowls in the pot were stolen, was not in the circumstances a reasonable one, and that C should not have the onus cast upon him of satisfying the Court that he acquired possession of the two fowls lawfully. There is a well-known saying of Lord Bowen in *Cooke* v. *New River Company* (1) that "*obiter dicta*, like the proverbial chickens of destiny, come home to roost sooner or later." With this peril before me, I nevertheless take it upon me to say for guidance, although it is obiter as regards the present case, that in my opinion a prosecution under Section 297 will not lie where either at or before the point of time when the Police formally charge the accused person it is known that certain property has in fact been stolen and it is known also that the property seen or found in the possession of the person so being charged is that self-same property or forms part of it. In such circumstances as these it is manifest that at the time the accused person is formally charged suspicion that the property in his possession has been stolen is non-existent inasmuch as it is known for a fact that the property has been stolen, and knowledge is quite distinct from and incompatible with suspicion and its accompanying uncertainty.

Having thus explained what I conceive to be the object and meaning of Section 297 I desire before proceeding to consider its application to the facts of the present case to add that it must not be assumed that the illustrations which I have made use of in this judgment exhaust all the sets of circumstances to which that section is applicable. But whatever may be the circumstances to which the section is sought to be applied the three questions which the trial Court is called upon to answer will never vary.

THOMAS, J.: The appellants were charged with (1) stealing; (2) being in possession of property reasonably suspected of being stolen; and (3) obtaining money by means of a trick. They were found guilty of second count and acquitted upon counts 1 and 3.

The main ground upon which appellants base their appeal is that there is no evidence to show that they had unlawfully in their possession an ox reasonably suspected of being stolen, and further that there was no onus cast upon them of showing that their possession was lawful. Counsel relied upon *R.* v. *Togli Nicola* (2), and *R.* v. *George Kalla* (3). The first case decides that false conflicting accounts given by the prisoner of how he came by the property may legitimately be taken into consideration in determining

(1) 38 Ch. D. 471.
(2) 8 C.L.R. 4.
(3) 9 C.L.R. 13.

whether the property was reasonably suspected of being stolen; and further that there is a burden upon a person found in possession of property reasonably suspected of being stolen of satisfying the Court that he acquired possession lawfully. In the second case the accused was convicted of being in possession of certain ewes reasonably suspected of being stolen: the Court considered that a reasonable suspicion of the property being stolen arose from the fact that he had given four entirely different explanations of how the ewes came into his possession. The Court expressed the opinion that Section 20 of Law 1 of 1886, which is identical with Clause 297 of the Criminal Code, cannot have been intended to deal with ordinary cases of larceny and receiving, where a person has property stolen from him, and this property is afterwards found in the possession of the accused. Such a case is dealt with by the ordinary law. The learned judges say that the Section was primarily intended to deal with unidentifiable property, but that it is not confined to such cases. The judgment continues: "There seems to be an impression that if a charge is lodged under this section, a less measure of certainty is required for conviction, than if the charge had been an ordinary charge of stealing and receiving. This is, however, a mistaken impression. The measure of evidence is the same in either case. We do not think that the evidence was such as to justify a conviction on a charge of larceny, and we think, therefore, that it was not sufficient to justify a conviction on a charge under this section." The Court held that where a person is charged with being in possession of identifiable property the onus of proof and the measure of proof necessary for conviction are governed by the same principles as those observed in a prosecution for larceny. This opinion has given rise to a great deal of misunderstanding: it has been frequently interpreted, as counsel for the appellants contends in the present case; that is to say, since the proof for being in possession of property reasonably suspected of being stolen must be the same as for a case of larceny, there must be *animus furandi*. If this is a proper deduction from the judgment, then I must say that with great respect I dissent from such an opinion. I do not think the views in the two cases cited can be reconciled, the second case is quite inconsistent with the first. To see what proof is required it is necessary to consider the three cognate offences separately. In larceny you must prove a taking and carrying away without the consent of the owner, and further that the goods stolen are the property of the person named in the charge. In receiving it is necessary to prove a larceny of the goods and knowledge by the receiver at the time he received the goods that they had been feloniously stolen. To

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establish a charge of unlawful possession it is necessary to prove that a person is in possession of property which is reasonably suspected of being stolen; that is to say, the fact of possession of the goods and the reasonable suspicion of their being stolen. If these two facts are proved the offence is complete unless the accused satisfies the Court that he acquired possession lawfully. As the three offences each contain different ingredients, I cannot understand what meaning can be attached to the statement in the judgment of *R.* v. *Kalla* that the onus of proof and the measure of proof are the same in unlawful possession as in larceny. This is certainly not so with regard to the onus of proof, which the statute in the case of unlawful possession places quite exceptionally upon the accused. To establish any one of these three offences the essential elements of each must be proved, and I have already pointed out that they are different for each offence.

The offence of unlawful possession seems to have been enacted expressly for those cases which do not come within larceny or receiving. It refers to the very common case of a man being found in possession of property which is not known to be stolen and of which the owner is not known, but which is his possession in such circumstances as to show a reasonable suspicion that it has been stolen. Once the fact of possession is proved, together with facts indicating a reasonable suspicion that the property is stolen, the person in whose possession the goods are found is guilty of a misdemeanour unless he satisfies the Court his possession was lawful. The reasonable suspicion that the property has been stolen is not, as counsel for the Crown suggested in argument, suspicion on the part of the person in possession of the goods. This appears clear from the judgment in the case of *Hadley* v. *Perks* (1), dealing with the English Statute from which Clause 297 was originally taken.

I think the grounds relied upon by the appellant cannot be sustained.

As to the facts, while I think in many respects the evidence is unsatisfactory, I think there was evidence before the Magistrate which entitled him to find that the appellants were in possession of goods which were reasonably suspected of being stolen, and entitled him to disbelieve appellants' explanation.

I have read the judgment just delivered and I fully concur with all the views expressed by the learned Chief Justice. I am of opinion that the conviction was right and should be affirmed.

FUAD, J.: I have had the opportunity of discussing the case with the Chief Justice, and I fully concur in the views expressed in the judgment which he has just read.

(1) L.R. 1 Q.B. 444.