R. v. F. C———. (A Juvenile).

CRIMINAL APPEAL CASE No. 9 OF 1941.

Child—evidence of guilty knowledge—time of animus furandi *is time of conversion and not time of taking—sitting of juvenile court—corporal punishment for child.*

The facts and the law are fully set out in the judgment hereunder. It should be noted that if the accused is under the age of 12 years the prosecution must show (from the evidence led for the Crown) that the accused knew he was doing a wrongful act. Once a *prima facie* case has been established the child can then be asked for his version of the offence. The second important point which emerges from this judgment is the difference between the law in England and the law in Northern Rhodesia with regard to the time at which the *animus furandi* applies. In England the time is that of the taking but in Northern Rhodesia it is the time of the conversion.

As to the consideration of *animus furandi*, the present case was approved in *Cheater* v. *The Queen* H.C. Criminal Judgment 15/1956, not yet reported. On the question of corporal punishment of juveniles see *R.* v. *Five European Juveniles* 4 N.R.L.R. 33.

Robinson, J.: This is an appeal by F.C., a child aged 10 years, from conviction and sentence passed on him by the learned Resident Magistrate, Kitwe, on a charge of theft *contra* section 243, Penal Code.

The facts are that a wrist watch belonging to a Mr. Stevens came into the possession of the child without the authority of Mr. Stevens, at the Nkana swimming baths on 22nd December, 1940, some time about 5 p.m. The next morning, the 23rd, the child went into Kollenberg's Store at Nkana with this watch. He saw a Mr. Smith employed in the store. He told Mr. Smith that he had been given a present of the watch (the watch belonging to Mr. Stevens) but as he had two watches already, he wanted to sell this one. Mr. Smith told him to go and get a note if he wanted to sell it. The child went away and returned with a note. Mr. Smith then bought this watch, which is a valuable one worth more than £8, for 20*s*.

That in effect is the whole Crown case and I will pause there to consider 1 (*b*) of the grounds of appeal which is as follows:

1. (*b*) At the close of the case for the prosecution there was no evidence or insufficient evidence before the Court to show that the said F.C. had, at the time of the offence, guilty knowledge that he was doing wrong and it was the duty of the learned Magistrate to refrain from calling the accused to answer the charge.

Section 6 (6) of the Juvenile Offenders Ordinance No. 41/33[1] states:

> "If it appears to the Court that a *prima facie* case is made out, the evidence of any witnesses for the defence shall be heard, and the child or young person shall be allowed to give evidence or make a statement."

When considering whether a *prima facie* case has been made out, section 15 Penal Code must also be considered:

> "A person under the age of 12 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act . . . he had capacity to know that he ought not to do the act."

Had the Magistrate reasonable grounds for letting it appear to him that a *prima facie* case of theft had been made out ? I think he had. Here was this expensive watch belonging to Mr. Stevens being sold by the child at a store the very morning after it had disappeared out of the possession of the rightful owner. An explanation is called for. It would appear to be "recent possession".

As to the child's criminal responsibility and his capacity to know he was doing a wrongful act, the proof can only come from all the circumstances of the case and in my opinion it is sufficient proof, looking of course at the Crown case alone, that the child made up quite an ingenious and perfectly untrue story when he was trying to sell the watch to Mr. Smith. If he had said to Mr. Smith, "I found this and now I want to sell it" it would be clear that he did not know he had done anything wrong. But concocting the story which he did, makes it perfectly clear to me that he had the capacity to know what he was doing was wrong.

But another kind of guilty knowledge is brought in under this head.

It is said that this offence is stealing by finding.

Now that I have come to the conclusion that a *prima facie* case was made out, it is permissible to look at the statement made by the child which was to the effect that he had found this watch lying on the ground inside the premises of the swimming bath. He had put it in his towel and taken it back to his mother. Then, to quote, "She told me to take it to the baths but I did not do so. I put it in a match box and kept it in the garden. Next morning I took it out and cut the straps off and threw them into the dust bin. I then went down town to try and sell the watch. . . ." It then transpires that when Mr. Smith demanded a note, he got a friend of his, aged 14, to forge one and on the strength of the forged note the sale was effected for 20*s*.

I have stated those facts because it is urged that at the time of the taking, i.e., in the baths, to prove the offence there must have been the *animus furandi*.

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[1] Now section 62 (6) of Cap. 8.—*Editor.*

Such cases as *Reg.* v. *Thurborn*, 1 Den. 387, have now been crystallised in section 1 of the Larceny Act which clearly states "A person steals who, without the consent of the owner, fraudulently and without claim of right . . . takes and carries away anything capable of being stolen with intent, *at the time of such taking*, permanently to deprive the owner thereof . . ."

The expression "takes" includes obtaining the possession . . . (*d*) by finding, *where at the time of the finding* the finder believes that the owner can be discovered by taking reasonable steps."

In other words, the state of mind at the "taking" is all important. Section 236 of the Penal Code is in very different phrases. It speaks throughout of "taking" or "converting" on equal terms.

Section 236 (3) Penal Code states "when a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion or whether it is at the time of the conversion in the possession of the person who converts it".

Subsection 4 states "When anything converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if *at the time of the conversion* the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered".

In other words the time of the "conversion" need not be the time of the "taking", and, under our Code, the state of mind at the time of conversion is all important, not at the time of taking.

Now, translating that into the facts of this case, assuming in favour of the child that when he took the watch from the bath that he had no formed intention of stealing it, yet, after his talk with his mother, there can be no doubt that he had no reasonable grounds for believing that the owner could not be discovered and when he did the act of conversion, i.e., keeping the watch and disobeying the proper advice of his mother, he knew what he was doing was wrong and the conversion was fraudulent.

I have therefore come to the conclusion that the ground of appeal marked 1 (*b*) contains no reasons for reversing the learned Magistrate's decision.

Ground 1 (*a*) is to the effect that the Magistrate did not observe the provisions of section 3 (1)[1] of the Juvenile Offenders Ordinance, 1933, in so far as he sat in the ordinary court at Kitwe between the hours of 10 to 12 in the forenoon on the 28th December which was the day and the hour provided for the determination of criminal cases.

In view of this ground of appeal and in view of the fact that the case file was only marked "Juvenile Court", I asked the learned Magistrate to send me a report. In it he states that the ordinary days and times for sittings of his court at Kitwe are Mondays and Thursdays at 8.30 a.m. When an extra sitting is necessary in any week it is held on Saturday at

[1] Now section 117 (1), Cap. 8.—*Editor.*

8.30 a.m. In sitting in this case on a Saturday at 10 a.m. he states he was sitting at a different time from the times on which the ordinary sittings of the Court are held. On taking his seat on the bench he announced he was sitting as a Juvenile Court and the Court was cleared in accordance with section 3 (4).[1]

I have come to the conclusion that that is a sufficient compliance with the section. The section gives three alternatives:

(i) to sit either in a different building or room from that in which the ordinary sittings of the Court are held;

(ii) to sit on different days; or

(iii) to sit at different times from those at which the ordinary sittings are held.

The object of the provision I think is to remove from the proceedings the atmosphere of an ordinary criminal court and therefore I express the opinion that whenever practicable a juvenile court should not be held in a court at all but in some other room. I know that in some places lack of alternative suitable accommodation may make this impossible, in those cases a different atmosphere should be created by the Magistrate not sitting on the bench, but at the solicitors' table and the proceedings should be somewhat informal; of course if the courtroom has to be used either (ii) or (iii) above must also be observed.

As to the last ground of appeal at the end of 2 (*b*) " There is no provision in the Juvenile Offenders Ordinance for the infliction of corporal punishment upon a child ", the same point has been taken in England in connection with the Childrens Act, 1908, and it is quite clear from Lydford's case 10 C.A.R. 62 that under the Ordinance corporal punishment can be inflicted. Ground 2 (*a*) complains that the Magistrate did not sufficiently comply with section 6 (7)[2] of the Ordinance in that he did not obtain such information as to the general conduct, home surroundings, school record, medical history or otherwise as might have seemed necessary to enable the Court to deal with the case in the best interests of the child. The Magistrate's report is lucid on this point but I think perhaps it would have been better had some note been made on the case record at the time. What is necessary must vary with the circumstances of each case.

I find nothing in the many points taken on behalf of the appellant which can vitiate the conviction. But there is one more point, the sentence imposed by the learned Resident Magistrate was that the child should receive three strokes with the cane; it is urged that as he is only 10 years old and this was his first offence he should have been bound over on probation.

That plea would have fallen on deaf ears except for one thing. When the Magistrate passed sentence, it was a perfectly proper sentence, richly deserved and on the lenient side. Had it been carried out forthwith it would have, in my view, been in the interests of the child. But an appeal was entered and owing to unavoidable circumstances the appeal could

[1] Now section 117 (2), Cap. 8.—*Editor.*

[2] Now section 62 (7), Cap. 8.—*Editor.*

not be disposed of until to-day, i.e., four weeks after the sentence was passed. Before the caning can be administered another thirty days must elapse because by section 24 of the Rhodesian Court of Appeal Ordinance (No. 35/38)[1] in the case of corporal punishment the sentence shall not be executed until after the expiration of the time within which notice of intention to appeal may be given, which is thirty days.[2]

I do not think it is right nor in the best interests of the child that he should have to suffer in anticipation of the caning for another thirty days, on top of the four weeks already elapsed.

It is on that ground only that I propose altering the sentence. I would like to make it clear again that the sentence of three strokes with a cane was a perfectly proper and fitting sentence to impose and it is only circumstances which have arisen since then that induce me to alter it.

The appeal against conviction is dismissed. The appeal against sentence is allowed and the following sentence substituted:

> The offender, F.C., to be discharged conditionally on his entering into a recognizance, with his father as surety in the sum of £25, to be of good behaviour and to appear for sentence when called upon at any time during a period of twelve months from to-day's date.

[1] Now repealed.—*Editor.*
[2] But see the proviso to section 302 of the Criminal Procedure Code.—*Editor.*