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IN THE HIGH COURT OF NEW ZEALAND
TIMARU REGISTRY

APPS 23/89

BETWEEN

H

Appellant

A N D THE POLICE

Respondent

**LOW
PRIORITY**

Hearing: 28th April 1989

Counsel: J.R. McGlashan for Appellant
S.H. Prisk for Respondent

ORAL JUDGMENT OF WILLIAMSON J.

This is an appeal against a conviction entered in the Timaru District Court on the 15th March 1989. The charge was that the Appellant, "being a servant employed by the Scarborough Restaurant in receivership, did steal 8 medium sized and 15 large sized Chinese rice bowls valued at \$170.61 the property of his employer the said Scarborough Restaurant in receivership".

The evidence in support of this charge was given by four witnesses. First was Mrs Carlene Elizabeth Spurr who had been a partner with her husband Rodney Craig Spurr in running the Scarborough Restaurant at Omarama. She said that the Appellant had been employed as a chef at the restaurant from approximately midway during 1987. She said that her husband had discussed with the Appellant the necessity for having Chinese bowls in the restaurant so that Chinese food could be served after preparation by the Appellant. She also said that her husband had ordered 15 large and 8 medium sized Chinese rice bowls from Mr Shaw of Twizel. She produced an invoice and statement showing that these bowls were purchased in September 1987. Initially she claimed in evidence that the bowls which were later found in the Appellant's possession, away from the restaurant, were the bowls which had been purchased from Twizel.

Secondly, Mr Shaw, the storekeeper from Twizel, confirmed that bowls of this nature had been supplied in September 1987. He said that they had been ordered one night when he was at the restaurant for dinner. He indicated that he thought at the time they had been eating out of other Chinese bowls.

The third witness for the prosecution was one of the receivers who gave evidence of the events which occurred when the restaurant was placed in receivership and when the Appellant made a claim to various items including the bowls in question.

Fourthly, Constable Lambie gave evidence for the prosecution concerning his finding of bowls at the Appellant's residence. He said that at the time the Appellant claimed that he was the true owner of them in that they had been given or lent to him by a friend for use in the restaurant.

For the defence evidence was given by the Appellant, his wife and Mr . The latter claimed he had lent the same number of bowls to the Appellant.

The learned District Court Judge said that it was an extraordinary coincidence that the Appellant should have in his possession bowls of the precise number and size and colour as those which had been purchased by the restaurant from Twizel. In view of this coincidence he said that he accepted Mrs Spurr's evidence and, in effect, rejected the evidence of the Appellant and Mr

Counsel for the Appellant has referred to evidence of Mr Shaw, which raised the clear possibility that there were in fact Chinese bowls there in the restaurant prior to the bowls being purchased from Twizel. Mrs Spurr's evidence about these matters is somewhat indecisive because she did not seem to be aware of these Chinese bowls being there. She also was not aware of the colour of the bowls that were purchased from

Twizel and she was unable to say what bowls were actually at the restaurant at the time when she left.

A more important gap in the evidence was that Mr Spurr, who apparently was the principal person running the restaurant, was not called to give evidence. He was the person who had been in charge of the restaurant following a disagreement with Mrs Spurr and immediately before it was put into receivership, at a time when there was apparently great muddlement and mess insofar as the continuation of the restaurant was concerned.

Accordingly on the evidence there could well have been Chinese bowls of the same type in the Restaurant prior to the purchase of bowls from Twizel and more importantly there could have been bowls of exactly the same type left there after the Appellant vacated the premises. There is no specific evidence concerning what bowls were in fact left at the restaurant.

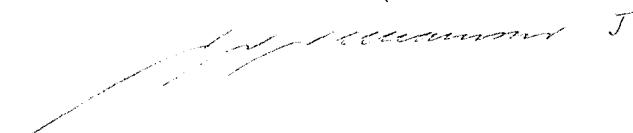
While initially, upon reading these notes of evidence, I was completely in sympathy with the view of the District Court Judge that the coincidence of numbers was amazing, it appears on a closer reading of the evidence that that is fully explainable by the fact that the Appellant had asked Mr Spurr to obtain bowls to replace those which had been borrowed from Mr Accordingly, if in fact the Appellant had borrowed 15 large and 8 medium bowls from Mr then it was not a coincidence that the same number and size should have been purchased by the restaurant from Mr Shaw in Twizel. There is an explanation for why the numbers and sizes would be the same. A close reading of the evidence does not indicate that Mrs Spurr was able to say that the bowls were of the same colour.

Given that this was the essential factual matter upon which the District Court Judge relied for his view on the evidence, I have been brought to the view by the Appellant that this conviction is unsafe.

Other matters relating to the nature of the charge itself, in view of a consent given by the receiver for the Appellant to take these goods and indeed as to whether or not the description of a restaurant as owner is in fact sufficient description of a person in the legal sense, are matters which it is not necessary for the Court to explore further.

In view of the conclusion I have reached as to the weight of the evidence and the danger in those circumstances in relying upon the evidence of Mrs Spurr to base a conviction of this nature, the appeal is allowed and the conviction quashed.

So far as costs are concerned, this is a case where the prosecution were caught in a cross-fire of claims between the separated owners of the restaurant, the receiver and the Appellant. There can be no doubt that the Police brought the prosecution in good faith but given all of the circumstances, particularly those relating to the gaps in the evidence of the principal prosecution witness, Mrs Spurr, and the failure to call as a witness Mr Spurr, it is appropriate in my view that some costs be allowed. The sum of \$75 will accordingly be allowed to the Appellant.

A handwritten signature in dark ink, appearing to be 'J. J. Macalister', written in a cursive style. The signature is positioned to the right of the main text block.

Solicitors:

Macalister Todd Phillips, Queenstown, for Appellant
Crown Solicitor, Timaru, for Respondent