IN THE SUPREME COURT OF NEW ZEALAND

SC 68/2014
[2015] NZSC 73

BETWEEN	RHYS MICHAEL CULLEN Appellant
AND	THE QUEEN Respondent

Hearing:	10 March 2015
Court:	Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ
Counsel:	N P Chisnall and P J Broad for Appellant M D Downs and Y Moinfar for Respondent
Judgment:	29 May 2015

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

(Given by Elias CJ)

[1] Rhys Michael Cullen was convicted after trial by Judge and jury of 15 counts under s 246 of the Crimes Act 1961 of receiving stolen vehicles in June 2009. The indictment charged Mr Cullen with receiving the stolen vehicles "together with Tamaki Metals Limited", although Tamaki Metals was not proceeded against in the indictment.[1]

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[1] The fact that Tamaki Metals was not proceeded against was a circumstance that was the subject of a pre-trial appeal to the Court of Appeal by Mr Cullen. The pre-trial appeal was dismissed by the Court of Appeal on the basis that it was not necessary for the Crown to charge the principal to an offence when proceeding against another party: *Cullen v R* [2013] NZCA 517.

[2] Section 246(1) imposes liability on "every one" who receives any stolen property knowing it to have been stolen or being reckless as to whether it has been stolen. So far as it is relevant, s 246 provides:

> **246 Receiving**
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> (1) Every one is guilty of receiving who receives any property stolen or obtained by any other imprisonable offence, knowing that property to have been stolen or so obtained, or being reckless as to whether or not the property had been stolen or so obtained.
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> …
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> (3) The act of receiving any property stolen or obtained by any other imprisonable offence is complete as soon as the offender has, either exclusively or jointly with the thief or any other person, possession of, or control over, the property or helps in concealing or disposing of the property.
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> …

[3] It was not in dispute at the trial that the vehicles were stolen. Nor was it in dispute that they were found on the yard of the scrap metal business managed by Mr Cullen and owned by the company, Tamaki Metals, of which he is the sole director.

[4] The vehicles had earlier been purchased and brought on to the yard by three employees of Tamaki Metals, Mr Leha, Mr Rogers and Mr McPherson.[2] Their actions in obtaining the vehicles and bringing them on to the yard were treated by the Judge in summing up to the jury as irrelevant to the case against Mr Cullen and Tamaki Metals because the case against Mr Cullen was based on his actions and recklessness[3] only after he became aware that the vehicles were on the yard.[4] The actions of Mr Cullen relied on by the Crown were his permitting the vehicles to remain on the yard for processing into scrap when he became aware of their presence and his completion of the necessary paperwork on behalf of Tamaki Metals in respect of 10 of them.[5] His recklessness as to whether the vehicles were stolen depended on the circumstances and condition of the vehicles and his knowledge of

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2 Mr Rogers was also charged with receiving but was discharged during the first trial: see *Cullen v R* [2012] NZCA 413 at [4].

3 The indictment contained no allegation that Mr Cullen knew the items had been stolen.

4 *R v Cullen* DC Manukau CRI-2009-092-016727, 13 November 2013 (summing up) at [52].

5 Mr Cullen acknowledged filling out the paperwork for 8 of the cars but the Crown evidence referred to 10.

how they had been acquired, evidenced in respect of some of the vehicles by the paperwork he completed.

[5] The defence case was that Mr Cullen's role on the yard was largely administrative. The defence maintained that Mr Cullen was not in a position to know of the presence of the vehicles and take control of them. Nor did he have the necessary knowledge of any suspicious circumstances which would make him reckless as to whether the vehicles were stolen.

[6] Because Mr Cullen was charged jointly with Tamaki Metals, the way in which Tamaki Metals became a party to the offending charged was in issue. After hearing argument on the point and considering the evidence, the Judge directed the jury that Mr Cullen was the "directing mind" of the company. He rejected a defence contention that the actions and states of mind of the three employees who had purchased the vehicles and initially brought them on to the yard were properly attributed to the company. The three employees were not sufficiently senior. Mr Cullen's control of the company was evidenced by the way in which it was owned and operated.[6]

[7] Mr Cullen controlled the sole shareholder of Tamaki Metals and kept its records, including the records it was required to maintain under s 42 of the Secondhand Dealers and Pawnbrokers Act 2004. Although Tamaki Metals and Mr Cullen each held scrap metal licences under the Secondhand Dealers and Pawnbrokers Act, the application for Tamaki Metals' licence had been completed by Mr Cullen and he was the only person named on the licence as involved in its management. Mr Cullen worked from an office on the site and was present at the yard on an almost daily basis. Police observations of the yard confirmed he walked around the site and put him beside some of the stolen vehicles. This was the basis on which the trial Judge, Judge McNaughton, directed the jury as a matter of law that Mr Cullen was the "controlling mind" of Tamaki Metals. The effects of that direction were two. First, only Mr Cullen's actions and knowledge were to be attributed to the company. Secondly, only Mr Cullen's actions and recklessness constituted the elements of the offence charged under s 246.

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6 *R v Cullen* DC Manukau CRI-2009-092-016727, 13 November 2013 (summing up) at [34].

[8] The direction as to attribution of Mr Cullen's actions and knowledge to Tamaki Metals was the principal basis on which Mr Cullen appealed unsuccessfully to the Court of Appeal[7] and now appeals with leave to this Court.[8] He contends that it deprived him of putting to the jury his defence that the vehicles had been received by Tamaki Metals when they were brought on to the yard by the three employees of Tamaki Metals who purchased them, so that Mr Cullen himself could not be a party "with Tamaki Metals Limited". It was also suggested on the appeal that the equation of the company and Mr Cullen through the attribution direction, with its emphasis on Mr Cullen's control of Tamaki Metals, undermined the defence case that Mr Cullen's role was limited and clerical and that he was not shown to have had knowledge of the presence of the vehicles on the yard or the circumstances which suggested knowledge or recklessness of the fact that they were stolen.

The trial

[9] The form of the charge against Mr Cullen was dictated by the earlier history of the matter. The trial which gives rise to the present appeal was a retrial. It followed the quashing of Mr Cullen's convictions at an earlier trial in which he was charged with receiving the vehicles as the sole party. On the appeal of that earlier conviction, the Court of Appeal appears to have taken the view that, since Tamaki Metals held the scrap metal dealer's licence for the business,[9] Mr Cullen could have been guilty only as a party to receiving by Tamaki Metals:[10]

> [29] If Tamaki held the licence, Mr Cullen could only have been guilty of receiving if the Crown demonstrated that he was a party to it. That could have been done by proving, beyond reasonable doubt, either that he helped or encouraged Tamaki to commit the offence, or assisted in its commission.
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> [30] At trial, the Crown seems to have treated Tamaki as Mr Cullen's alter ego. That approach conflated the different legal personalities of Mr Cullen, as an individual, and Tamaki, as a corporate entity. It explains the absence of any direction on that topic from the trial Judge. Nevertheless, the Judge's misunderstanding as to the true owner of the licence contributed to some confusion about the basis on which Mr Cullen could be prosecuted. Plainly,

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7 *Cullen v R* [2014] NZCA 325, [2014] 3 NZLR 471 (White, Keane and MacKenzie JJ).

8 *Cullen v R* [2014] NZSC 148.

9 The Court of Appeal in the first appeal appears to have been under the misapprehension that Mr Cullen did not himself hold a secondhand-dealer's licence. He did, however, as was recorded in a memorandum of 2 August 2012 provided to the Court by the Crown.

10 *Cullen v R* [2012] NZCA 413 (citations omitted).

> if he did not hold the relevant licence, he could not commit the offence as a principal.

[10] At the second trial, Mr Cullen was accordingly charged as a party to the offences "together with Tamaki Metals Limited". That was the background to the trial Judge's directions that, as a matter of law, the acts and state of mind required for Tamaki Metals to be guilty of the offence were the actions and state of mind of Mr Cullen alone.

[11] The Crown case at the second trial accepted that the admittedly stolen vehicles were purchased for scrap by three employees of the company, who paid cash for them and brought them on to the yard. It did not seek to show that the employees were acting under Mr Cullen's direction in obtaining the vehicles. Instead, it relied on Mr Cullen's having taken control of the vehicles when he became aware of their presence on the yard and undertook some of the processing relating to them.

[12] The Crown evidence was that Mr Cullen worked in an office on the yard and was in a position to see the vehicles on the yard (this was supported by evidence of police observations which had Mr Cullen seen beside some of the vehicles). Mr Cullen filled in the dealer records for 10 of the motor vehicles in a manner which was largely incomplete and inadequate. As later summarised by the Court of Appeal in the judgment under appeal:[11]

> [11] Most of the records were not signed on behalf of [Tamaki Metals]. Many were not dated. The vehicle descriptions were minimal – sometimes make and model, sometimes just "car". There were seldom registration numbers, no VIN numbers, and no identifying details of the seller. Many of the suspect records recorded the customer number "527", which was assigned to "Margot Gollotoa". Mr Cullen admitted he knew there was a problem with that customer number. That customer number was recorded against 80 per cent of the cars purchased by the company as scrap metal in May 2009 and 50 per cent of those bought in June 2009. There was often a mismatch between the name assigned to "527" and the names on dealer's records which sometimes were "Shaun" or "Jared".

[13] In addition to the inadequacies in the record-keeping by Mr Cullen in relation to the vehicles, there were other circumstances relied upon by the Crown as evidence

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[11] *Cullen v R* [2014] NZCA 325, [2014] 3 NZLR 471.

of Mr Cullen's recklessness that the vehicles were stolen. They included the unusually high number of vehicles received in May and June 2009. A number had been brought to the yard by the two men whose names were sometimes recorded by Mr Cullen as "Shaun" or "Jared". Most vehicles were in good condition and roadworthy, as was evidenced by their current warrants of fitness. They were clearly worth much more than the average scrap price of $200 which was paid for them. A number had broken ignition barrels and side windows and contained personal possessions. Most of the cars did not have registration plates.

[14] The effect of the direction as to attribution was that only Mr Cullen's assertion of control over the vehicles already on the yard (through undertaking paperwork and permitting the vehicles to remain for processing into scrap) and recklessness as to whether they were stolen were in issue at trial. The actions and knowledge or recklessness of the three employees was insufficient. The Judge directed the jury that how the vehicles came to be on the yard was "not strictly relevant".[12] The Judge determined, in an in-chambers discussion:

> The company, ie Mr Cullen, needs to know that vehicle is there. The company, ie Mr Cullen, needs to intend to exercise control and at that point the company has possession and at that point receiving is complete.

[15] In respect of each charge, the question trail provided by the Judge to the jury (after identifying the questions not in dispute – of value, the fact that each vehicle was stolen, and its presence on the yard at the relevant time as charged) required the jury to decide:

> 4. Are you sure that Tamaki Metals Limited, ie the accused [Mr Cullen] knew that vehicle was at the yard?"
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> …
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> 5. Are you sure that Tamaki Metals Limited ie the accused [Mr Cullen] intended to exercise control over the vehicle?"
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> …
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> 6. Are you sure that at the time Tamaki Metals Limited intended to exercise control over the vehicle that Tamaki Metals Limited ie the accused [Mr Cullen] was reckless as to whether that vehicle was stolen or previously obtained by a crime?

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[12] *R v Cullen* DC Manukau CRI-2009-092-016727, 13 November 2013 (summing up) at [52].

…

7. Are you sure that accused [Mr Cullen] assisted encouraged or procured the company's receiving of that vehicle?

…

8. Are you sure that assistance, encouragement or procurement was intentional?

[16] In the directions, the Judge told the jury that which actions and knowledge could be attributed to Tamaki Metals were questions of law for him to decide:[13]

> It is for me to decide who those people are, who the people are who would be effectively the mind, controlling mind and body of the company, and I direct you as a matter of law that that is the accused Mr Cullen. So that is not a question you have to decide, I decide it as a question of law. Effectively he is the only person in a position to be the controlling mind of the company, and that is obviously because he was the sole director, he was the chief executive officer, he controlled and was responsible for the company's employees and that included the people who were doing the buying … Tavake Leha, Ron McPherson, Clayton Rogers. None of those people would qualify as a directing mind of company so for your purposes the mind of the company is the mind of the accused Mr Cullen. … So question 4 requires you to be sure that Tamaki Metals Limited, that is the accused Mr Cullen, knew that the particular vehicle … was at the yard.

[17] The time at which Mr Cullen's recklessness had to be established was emphasised by the Judge to be the point of time when "Mr Cullen intended to exercise control over the vehicle".[14] The Judge instructed the jury that what had happened to the vehicle before that was "in a sense, … not strictly relevant":[15]

> What you need to do is assess the accused's state of mind, the company's state of mind at the point where he decided to exercise control over [the vehicle] … So whatever was going on at the front line, in the buying of the cars, you do not have to resolve that. You do not have to work out exactly how it was, how it was working. You do not have to work it out why all these cars came in in June or whether it happened in the weekend, on a Saturday or Sunday, or whether it happened at night because the security was slack. You do not even [have] to decide who was buying these stolen cars, whether it was Mr Leha, Mr Rogers, Mr McPherson, or a combination or all three. None of that matters. It is the accused's knowledge and intention that is important and the point at which you assess that is at the point where one, he knew the vehicle was on the yard; and two, at the point he intended to exercise control over it. And that might have happened later on in the day when the car was bought, it might have happened the next day, it might have

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13 At [34]–[35].
14 At [52].
15 At [52]–[53].

> happened two or three days later, it does not matter. But you need to make the assessment at the time he intended to exercise control over the particular vehicle, and the question you need to ask is, "Was he aware of the risk that the vehicle might be stolen, and did he take that risk? And given the nature of the risk which he recognised, was it unreasonable to take?" And this is where the Crown and defence direct most of [their] arguments.

[18] In relation to questions 7 and 8 of the question trail, dealing with party liability, the Judge reminded the jury of the contentions of the Crown and defence (including the Crown's reliance on the evidence as to completion by Mr Cullen of the dealer records, the suspect supplier number, the number of cars, their condition, the lack of registration plates and the damaged ignition barrels).

Appeal to the Court of Appeal

[19] Following his conviction at the second trial, and before sentence, Mr Cullen appealed to the Court of Appeal against his conviction. The principal ground of appeal was that the trial Judge had been wrong to determine that only the acts and state of mind of Mr Cullen were to be attributed to Tamaki Metals, excluding the acts and states of mind of the other employees.

[20] The Court of Appeal concluded that s 246 provided no guidance on attribution for the purposes of the offence of receiving by a company, such as sometimes arises in statutory offences, particularly of a regulatory nature, when there may be a policy basis for wider attribution.[16] Nevertheless, it considered there were indications in the Secondhand Dealers and Pawnbrokers Act that, in the case of a company with a licence under the Act, senior management would have to be involved because it was not likely that Parliament intended loss of the licence (a sanction for conviction under s 246) as a result of actions of "junior employees".[17] On the undisputed evidence, it was satisfied that only Mr Cullen had sufficient responsibility to qualify for the purposes of attribution of his actions and understanding to the company.[18] The Court considered that the trial Judge had been

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16 As in *Linework Ltd v Department of Labour* [2001] 2 NZLR 639 (CA).
17 *Cullen v R* [2014] NZCA 325, [2014] 3 NZLR 471 at [28].
18 At [29]–[30].

correct to view the question of attribution as one of law.[19] Nor did it depend on disputed questions of fact appropriately left to the jury.[20]

[21] The Court of Appeal considered that it had remained open to Mr Cullen to raise as a defence that "no offence was committed by [Tamaki Metals] because the stolen vehicles were in fact 'received' by Messrs Leha, Rogers and McPherson and not by Mr Cullen …". The Court considered, however, that questions 4, 5 and 6 in the question trail and the directions given by the Judge "correctly left these factual issues for the jury".[21]

[22] Having made this determination, the Court of Appeal pointed out that the submission that the Judge's description of Mr Cullen's assistance was not capable of amounting to assistance as a party (because it "post-dated the completion of [Tamaki Metals'] receiving") was simply to restate the argument that Tamaki Metals had "received the vehicles via the acts of other employees". It was therefore "contrary to the Judge's attribution direction".[22] Nor did the Court of Appeal accept the further submission (also, it considered, contrary to the attribution determination) that there was error in respect of the time at which recklessness had to be established":[23]

> There is nothing exceptional in the proposition that a vehicle might be on [Tamaki Metals'] yard without being in its possession (until it came to the attention of Mr Cullen). It was the timing of Mr Cullen's recklessness that mattered, not any recklessness by the other employees whose acts and state of mind could not in the circumstances of this case be attributed to [Tamaki Metals].

[23] The Court of Appeal rejected the argument on behalf of Mr Cullen that, even if recklessness by the employees was not attributable to the company (so that Mr Cullen's recklessness was necessary), the possession by the employees was sufficient for the purposes of receiving. The Court considered that this analysis was incorrect:[24]

> Section 246(1) does not contemplate a separation of the physical element from the mental element in this way. The knowledge or recklessness of the

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19 At [31].
20 At [32].
21 At [33].
22 At [35].
23 At [38].
24 At [40].

> defendant is to be assessed at the time of the receipt of the property. In this context, where the defendant is a company, both elements are to be assessed at the time any person whose state of mind can be attributed to the company asserts control over the property. Only then is the property received by the company in terms of s 246.

[24] The Court of Appeal also rejected the submission that there was a conceptual difficulty with simultaneous offending by a corporate entity and the individual whose actions and knowledge are attributed to it so that, in effect, "Mr Cullen is being a party to his own offending". The Court considered that there was no difficulty with Tamaki Metals and Mr Cullen committing the offences "simultaneously, [Tamaki Metals] as principal offender and Mr Cullen as a party to [Tamaki Metals'] offending":[25]

> Contrary to Mr Cassidy's submission, this is not inconsistent with the previous decision of this Court which arose in the different context of charges against both [Tamaki Metals] and Mr Cullen as principal offenders when it was necessary to distinguish his mind from [Tamaki Metals'] "mind". Once Mr Cullen was charged with being a party to [Tamaki Metals'] offending, his guilty mind established both [Tamaki Metals'] guilty mind, as the principal offender, and his own guilty mind, as a party assisting and encouraging [Tamaki Metals] to commit the offences. Mr Cullen's recklessness which constituted [Tamaki Metals'] guilty mind and his own guilty assistance and encouragement existed simultaneously.

The appeal

[25] The arguments on appeal followed those considered by the Court of Appeal. They largely concerned the trial Judge's direction on attribution and arose because of the form of the charge in the second trial, following the quashing of the convictions at the first trial. As the Court of Appeal in the case under appeal pointed out, a number of the points were not standalone and fell away if it was accepted that the trial Judge had been correct in his attribution direction. Similar misconceptions arose during argument on the present appeal in this Court. It should be acknowledged that proper analysis in the case was not assisted by what we regard as the unnecessary complication of the joint charge, necessitated by the first Court of Appeal judgment.

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[25] At [42].

The joint charge was not necessary

[26] We consider the Court of Appeal on appeal from the convictions following the first trial was wrong to take the view the appellant could be charged as a secondary party only to receiving by Tamaki Metals because Tamaki Metals held the licence under the Secondhand Dealers and Pawnbrokers Act.

[27] In the first place, the approach taken by the Court of Appeal may have been prompted by a mistaken view of the facts and the effect of the licence. Mr Cullen seems to have held a licence in his personal capacity in any event. In addition, as sole director of Tamaki Metals, his conviction for receiving would have made Tamaki Metal's licence amenable to cancellation.[26] Both circumstances suggest that Tamaki Metals was not a necessary defendant for policy purposes under the Secondhand Dealers and Pawnbrokers Act.

[28] More importantly, the Secondhand Dealers and Pawnbrokers Act does not cut down s 246(1), which is contained in a statute of general application. It applies to "every one" who receives stolen property, knowing it to have been stolen or being reckless as to whether or not it is stolen. That an additional sanction (cancellation of licence) is provided by the Secondhand Dealer's and Pawnbrokers Act on conviction under s 246 does not have the effect that only the licensed dealer can be liable as a principal party when stolen goods are received in the course of a secondhand dealer business. "Every one" who receives such goods (exclusively or jointly) knowingly or recklessly commits the offence.

[29] There was no impediment under the Crimes Act to Mr Cullen being charged as principal on the basis of his taking control of the stolen vehicles with the requisite knowledge or recklessness, whether or not he was the holder of a licence under the Secondhand Dealers and Pawnbrokers Act. Indeed, the principles of criminal responsibility would be unaccountably distorted if an individual who takes control or conceals or disposes of stolen property with or through a licensed secondhand dealer must always be charged jointly with the licensed dealer.

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[26] Secondhand Dealers and Pawnbrokers Act 2004, ss 4, 16(1)(b) and 22(a).

[30] We are therefore of the view that it was not necessary for Mr Cullen to have been charged jointly with Tamaki Metals. The charge could have been brought against him alone.

Although unnecessary, the joint charge was not wrong

[31] On the other hand, there is nothing wrong in law with the way in which the charge was framed in the second trial.

[32] As the recognition in s 246(3) that receiving may occur "exclusively" or "jointly" makes clear, "every one" who is liable under s 246 may act alone and be individually responsible or may act jointly and be jointly responsible. In addition, the general parties provision under the Crimes Act, s 66, ensures that parties may be principal parties or secondary parties to any offence, also imposing joint liability. Under s 66(1) of the Crimes Act "every one is a party to and guilty of an offence who":

> (a) actually commits the offence; or
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> (b) does or omits an act for the purpose of aiding any person to commit the offence; or
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> (c) abets any person in the commission of the offence; or
>
> (d) incites, counsels, or procures any person to commit the offence.

[33] It was quite in order to proceed against both the company and Mr Cullen as parties to the same offending. In some cases, especially if a penalty is sought against the company or if proceeding against the company is necessary to obtain forfeiture of its licence (as is not the case here since forfeiture was available on conviction of Mr Cullen as the sole director), the Crown may choose to proceed against the company. As this case perhaps illustrates, however, in cases where a conviction against the company is not sought, a joint charge may cause complexity it would be sensible to avoid:[27]

> To say that a company can commit virtually any crime does not mean that it always makes sense to prosecute the company. Where the directors commit a *mens rea* offence, it may be better policy to concentrate upon them.

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[27] Dennis J Baker *Glanville Williams Textbook of Criminal Law* (3rd ed, Sweet and Maxwell, London, 2012) at [38-019].

[34] In its judgment on the pre-trial challenge to the fact that Tamaki Metals was not being proceeded against in the indictment, the Court of Appeal took the view that it is unnecessary for the Crown to charge a principal either at the same time as a party or "at all".[28] Some commentators suggest that this proposition may be too widely stated and that the authorities support proceeding against a secondary party alone only when a principal party is unknown, not amenable to prosecution or dead.[29] It is unnecessary to express any concluded view on the matter, which is not before us. In principle and given the terms of s 66 there would seem to be no impediment provided that in the circumstances of the trial there is no disadvantage to the accused. The question of disadvantage is further considered at [45]–[49].

Attribution

[35] A crime may be committed by a company, as well as by a natural person, as the definition of "person, owner, and other words and expressions of the like kind" in s 2 of the Crimes Act to include companies for the purposes of the Crimes Act indicates. "Every one" (the expression used in s 246(1)) is an expression "of the like kind" to "person", as the use of the word "person" in s 246(3) and s 246(5) to refer to the offender under s 246 suggests. Similarly, the terms "every one" and "person" are used interchangeably in subsections (1) and (2) of the party provision, s 66. With a few exceptions where the terms of a crime look to a human actor (murder and manslaughter being the obvious examples, since "homicide" is defined as the killing "of a human being by another")[30] companies may be charged with crimes.

[36] Where a non-natural person is charged with an offence, the actions and states of mind required by the terms of the offence are actions and states of mind of human actors which are attributed to the company. It is consistent with general principles of criminal culpability that attribution of the basis of criminal responsibility to a

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28 *Cullen v R* [2013] NZCA 517 at [8].

29 See AP Simester and WJ Brookbanks *Principles of Criminal Law* (4th ed, Brookers, Wellington, 2012) at [6.6]; and Robertson ed *Adams on Criminal Law* (looseleaf ed, Brookers) at [CA66.07].

30 Crimes Act 1961, s 158. Even in the case of manslaughter, a majority of the Court of Appeal has left open the question whether a company can be a party to manslaughter under s 66 and North P was willing to say that a company can be a party to manslaughter under s 66: see *R v Murray Wright Ltd* [1970] NZLR 476 (CA). Other examples given in AP Simester and WJ Brookbanks *Principles of Criminal Law* (4th ed, Brookers, Wellington, 2012) at [7.2] and Robertson ed *Adams on Criminal Law* (looseleaf ed, Brookers) at [CA2.27.03] are perjury, bigamy and sexual offences.

company is generally limited to those of the human actor or actors who direct the company. That does not mean rigid adherence to the hierarchy recognised for corporate liability in other spheres of activity. The scope of attribution depends on the substantive law in issue and, as the Privy Council pointed out in *Meridian Global Funds Management Asia Ltd v Securities Commission*,[31] it turns on its interpretation. If the law was intended to apply to a company, "how was it intended to apply?":[32]

> Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy.

[37] The trial Judge found that the acts and mental state attributed to the company were, for the purposes of s 246, properly confined to the acts and recklessness of Mr Cullen as the "directing mind and will" of the company.[33] Following *Meridian*, it may have been preferable to start without any preconception that it is necessary to look for such human "directing mind and will". As a matter of interpretation, the policy of the legislation may indicate wider attribution, beyond a single "directing mind and will" or even beyond a group exercising such control or identified by hierarchy. Such context has caused courts to attribute the actions and knowledge of lower-level managers or employees, especially in cases where the rule in issue is regulatory in nature.[34]

[38] Section 246 is however a statutory provision contained in a general criminal code and which describes serious criminal offending. Since one of the consequences provided for in legislation following conviction under s 246 is for cancellation of a licence under the Secondhand Dealers and Pawnbrokers Act, that consequence is part of the legislative framework to be interpreted. As the Court of Appeal said, cancellation pulls against casting the net of attribution too widely.[35] But, indeed, the significant criminal consequences make that consideration something of a makeweight.

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31 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (PC).
32 At 12–13.
33 *R v Cullen* DC Manukau CRI-2009-092-016727, 13 November 2013 (summing up) at [34].
34 As in *Linework Ltd v Department of Labour* [2001] 2 NZLR 639 (CA).
35 *Cullen v R* [2014] NZCA 325, [2014] 3 NZLR 471 at [28].

[39] Although it may not have been necessary to insist on someone properly described, as Mr Cullen was, as the "directing mind and will of the company", there was in the context of the case no other candidate for attribution. The three employees, as the trial Judge and the Court of Appeal both agreed, were not of sufficient level of responsibility for their actions and knowledge or recklessness to be properly attributed to Tamaki Metals.[36] On that basis, the trial Judge was correct to attribute to Tamaki Metals the actions and recklessness of Mr Cullen alone and not those of the three employees who first obtained the vehicles.

[40] The upshot is that although Mr Cullen could have been charged on the facts as a principal, that does not prevent him equally being charged as a party to the offending with the company based on attribution to it of his receiving with knowledge or recklessness as to whether or not the cars were stolen.

The defence was not undermined by the direction as to attribution

[41] The appellant's defence turned on his contention that Tamaki Metals had already received the stolen vehicles before it was suggested he had became aware of their presence on the yard.[37] On that basis, he could not have been a party to the offence by Tamaki Metals. It was already completed in terms of s 246(3), which provides that that an offence of receiving is complete "as soon as the offender has, either exclusively or jointly with the thief or any other person, possession of, or control over, the property or helps in concealing or disposing of the property". Someone who receives stolen goods does not commit serial offences of receiving under s 246 through subsequent dealings with property already received by him.[38] Mr Cullen could not therefore be a party to a later receiving by Tamaki Metals. The appellant argues that this defence was undermined by the Judge's direction that the acts and state of mind of the employees who bought the vehicles was not to be attributed to Tamaki Metals.

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[36] See *R v Cullen* DC Manukau CRI-2009-092-016727,13 November 2013 (summing up) at [34] and *Cullen v R* [2014] NZCA 325, [2014] 3 NZLR 471 at [29]–[30].

[37] Presence on the yard could not have been sufficient for receiving without such knowledge and the exercise of control by the appellant: *R v Cavendish* [1961] 1 WLR 1083 (CA).

[38] *R v Smythe* (1981) 72 Cr App R 8 (CA); *R v Johnson* (1911) 6 Cr App R 218 (CA); and *R v Matthews* (1950) 34 Cr App R 55 (CA).

[42] The point is misconceived. There is no impediment to different offences of receiving arising in a series of dealings with stolen property, as is clear from the terms of s 246(3) which refer severally to "control", "concealing" and "disposing", indicating that offences of receiving may arise at any point in a sequence of dealings with stolen property. There was nothing to stop the employees being charged separately from Mr Cullen for their actions and states of mind, if themselves amounting to distinct offences of receiving. In reality, the focus on the company was unnecessary and confusing in circumstances where the offence charged was based entirely on Mr Cullen's actions and state of mind. The Judge directed the jury that his actions amounting to receipt and recklessness as to whether the vehicles were stolen had to coincide. The case was not therefore complicated by questions of initial innocent receipt and later knowledge which were in issue in *R v Kennedy*,[39] relied on by counsel for the appellant. Because *Kennedy* is not on point on the facts of this case, it is unnecessary to consider whether it was correctly decided on its own facts.

[43] As it was, while Tamaki Metals could not have received the stolen goods both when they came on to the property and later when Mr Cullen exercised control over them, such consecutive receiving by Tamaki Metals was not available on the case as put by the Crown and on the summing up of the Judge. In substance, the argument that the defence was undermined is a subset of the principal argument that the Judge was wrong to attribute only Mr Cullen's actions and recklessness to the company.

[44] Mr Cullen has taken the view that there is something wrong with his being charged, in effect, as "a party to his own offending". But there is, as the Court of Appeal rightly said, nothing wrong in concept with that result.[40] As already discussed, Tamaki Metals could have been proceeded against on the indictment or indeed separately (perhaps with a view to cancellation of its licence as a secondhand dealer) on the basis that Mr Cullen's actions and recklessness were attributed to the company.[41]

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39 *R v Kennedy* [2001] 1 NZLR 314 (CA).
40 *Cullen v R* [2014] NZCA 325, [2014] 3 NZLR 471 at [42].
41 See *Hamilton v Whitehead* (1988) 166 CLR 121.

[45] Although there is no legal or conceptual incongruity in Mr Cullen being a party to an offence committed by the company which is based on his own actions and state of mind, putting the charges on that basis was, as has been suggested, unnecessary here. We do not consider however that any disadvantage was occasioned to the defence by this fifth wheel of the coach.

[46] Difficult questions may arise in some cases as to the basis of the liability of secondary parties where a company receives stolen property with knowledge as a result of the actions and states of mind of a number of secondary parties which are properly attributed to it. Such difficulties do not however arise where a single secondary party is the sole source of the attributed necessary actions or state of mind, so that there is unity between the basis of culpability of the principal and the secondary party. That is the position here.

[47] It was not part of the Crown case or the case on which the Judge directed the jury that Mr Cullen and, through him, the company came into possession or control of the stolen vehicles when they were first brought on to the yard. The Crown case did not suggest that Mr Cullen or the company had responsibility for bringing the vehicles on to the yard. How the vehicles came on to the yard was largely irrelevant, as the trial Judge explained to the jury.

[48] Mere presence on premises, without more, is not sufficient to constitute someone in control of the premises as a receiver.[42] Here, rather, the Crown relied on the actual actions and understandings of Mr Cullen as the person in charge of the yard and the scrap metal recovery in entering the transactions for many of the vehicles in the books and in his knowledge (based on circumstantial evidence and direct evidence of police observations of the yard) of the presence of the other five vehicles for the purposes of crushing for scrap metal. It was Mr Cullen's taking possession or control in this way with recklessness as to whether or not the vehicles were stolen that were attributed to the company and constituted the offence.

[49] Mr Cullen's defence that he did not have reason to know that the vehicles were on the yard or to be suspicious about whether they were stolen was the central

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[42] *R v Cavendish* [1961] 1 WLR 1083 (CA).

issue at trial. That was rejected by the jury in finding him guilty. The suggestion Mr Cullen was deprived of an additional defence that the company had already received the stolen vehicles through the actions and knowledge of the employees was misconceived. It was only his subsequent actions constituting possession or control with recklessness that were put forward as the basis for his liability and (through him) the company's liability in respect of that receiving. There is no possible miscarriage of justice in the way the matter was, properly, presented to the jury.

Result

[50] The appeal against the convictions is dismissed.

Solicitors:
Public Defence Service, Wellington for Appellant
Crown Law Office, Wellington for Respondent