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1972

S. H. No. 01208

IN THE SUPREME COURT OF NOVA SCOTIA
APPEAL DIVISION - CROWN SIDE

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

EUGENE LAWRENCE LIVELY

Appellant

[ORAL OPINION]

McKINNON, C.J.N.S.:

The appellant was charged

"that he at or near Halifax, in the County of Halifax, Nova Scotia, on or about the 4th day of October, 1972, did unlawfully steal merchandise of a total value not exceeding \$200.00, the property of Capitol Stores Limited contrary to section 294(b) of the Criminal Code".

The appellant pleaded not guilty and was tried before His Honour Judge W. A. D. Gunn on November 1, 1972. The appellant was found guilty of this offence and was ordered to pay a fine of \$75.00, or, in default thereof, to serve a term of one month's imprisonment in the Halifax County Correction Centre.

The facts are:

For about seven months previous to the 4th of October, 1972, the father of the appellant had been engaged in hauling garbage and delivering groceries from the Capitol Store in Fairview. On October 4, 1972, Mr. Lively, Sr., was hauling garbage from the store assisted by his son, the appellant.

Suspicious that a bag of potatoes was missing from the store following the removal of a first load of garbage by the Livelys, the store manager, Mr. John Simm, and his assistant, Mr. Brian Reid, had placed a marked case of corned beef about three feet from the garbage and about five feet from the receiving door through which garbage was loaded into the Livelys' truck. When the truck returned to remove a second load of garbage, Mr. Simm observed the appellant taking the box of corned beef and placing it on the garbage truck.

After the truck was loaded and began to pull away from the store, Mr. Simm hopped on the back and discovered the case of corned beef under a pile of garbage in the rear of the truck.

The notice of appeal sets forth the following grounds:

1. THAT the learned Judge erroneously convicted the Appellant of the offence aforesaid;
2. THAT the said conviction was contrary to the law, the evidence and the weight of the evidence at trial;
3. THAT the learned Judge failed to allow the Appellant the benefit of a reasonable doubt;
4. On such further and other grounds as evidence may disclose and the Court may permit."

Following a complete review of the record, and having heard the submissions of counsel, it is the opinion of the Court that all the necessary elements of the offence were established by the evidence in the Court below. It is also our unanimous opinion that there was evidence before the learned trial Judge upon which he could find the appellant guilty beyond a reasonable doubt.

The appeal should be dismissed and the conviction confirmed.

DATED at Halifax, Nova Scotia, this 7th day of February,
A. D., 1973.

Members of Appeal Division

McKinnon, C.J.N.S.

Coffin, J.A.

Cooper, J.A.

Counsel

W. L. MacInnes, Esq.	
Michael Skutezky, Esq.	Appellant
Martin E. Herschorn, Esq.	Respondent