IN THE PRIVY COUNCIL No. 15 of 1974.

ON APPEAL FROM

THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

EDWARD FRANCIS NAKHLA Appellant

A N D

HER MAJESTY THE QUEEN Respondent

CASE OF RESPONDENT PURSUANT TO RULE 63.

"THE CIRCUMSTANCES OUT OF WHICH THE APPEAL ARISES"

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RECORD

1. This is an appeal from a judgment of the Court of Appeal of New Zealand (McCarthy P., Richmond and Beattie JJ.) given on 12 October 1973 dismissing an appeal against the conviction of the Appellant in the Supreme Court of New Zealand on 7 August 1973 after trial upon indictment of a charge that the appellant was deemed to have been a rogue and vagabond in that being a suspected person he did frequent a public place, Oriental Terrace, with felonious intent.

p.39

p. 1

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2. The charge upon which the appellant was convicted was laid under section 52(1)(j) of the Police Offences Act 1927. The principal question in this appeal is whether the word "frequents" in that section may be taken to refer to a single attendance in a public place.

3. The circumstances giving rise to this question may be briefly outlined as follows: There was evidence called by the prosecution to show that on 2 May 1973 the appellant got into a motorcar in Oriental Terrace, a public place, in which there were already two occupants, the appellant being in that place at that particular time by arrangement with one of the occupants. Whilst

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RECORD

the appellant was in the motorcar there was a discussion of the possibility of his receiving stolen property. Evidence of the length of time the appellant was in the motorcar and the purpose of his being there was provided, inter alia, by proof of a tape recording of the conversation in the motorcar made by one of the other persons present. A transcript of the conversation was also produced in evidence (Exhibit 'H'). The appellant declined to accept the stolen property offered to him in the motorcar. His reasons for so declining are contained in the transcript Exhibit 'H'. He was arrested as he left the motorcar.

pp.45-53

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4. Evidence was given by three police officers that by reason of transactions antedating the events described in paragraph 3 above, the appellant was a suspected person. Evidence was also given from which the inference could be drawn that he was present in Oriental Terrace with felonious intent. This evidence is summarised in the judgment of the Court of Appeal, and no issue arises in this appeal upon these elements of the offence of which the appellant was convicted.

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pp.27-28

5. Wild C.J., the trial Judge, directed the jury in respect of the element of frequenting, that the word "frequent""does not mean that he [the accused] must be proved to be there [in the public place] frequently. Action amounts to frequenting a place if it is proved that a man was in that place with a felonious intent. That is if he is there long enough to exhibit a felonious intent then that can amount to frequenting".

pp. 4-5

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6. The appellant, having been convicted, appealed to the Court of Appeal of New Zealand upon the grounds, inter alia, that the trial Judge had misdirected the jury or failed adequately to direct the jury on the requirement of "frequenting" and that the verdict of the jury was unreasonable or could not be supported having regard to the evidence, in that there was no sufficient evidence to support a finding of "frequenting". Judgment of the Court of Appeal, dismissing the appeal was given on 12 October 1973.

pp.20, 21.

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p.21

7. The Court of Appeal in further reasons for judgment, which had been omitted by accident from the Court's reasons delivered on the day judgment was given, and were delivered on 13 November 1973, held

p.40

pp.42-43

that the Chief Justice's direction on the element of frequenting was in accordance with the law. The Court considered the argument that one visit to a public place was not sufficient to amount to "frequenting" and, after reviewing certain authorities, rejected it. The Court expressly held that it would be enough that the appellant was in the public place sufficiently to achieve the felonious objective alleged if he was so minded.

10 8. Her Majesty in Council ordered on 10 April 1974 that the appellant be granted leave to appeal from the Judgment of the Court of Appeal to Her Majesty in Council. pp.43-44

"CONTENTIONS TO BE URGED BY THE RESPONDENT"

9. The Respondent contends:

A. That the meaning given to the word "frequents" by the trial Judge in his direction to the jury and approved by the Court of Appeal has been the accepted
20 meaning for that term in section 52(1)(j) of the Police Offences Act 1927 and was authoritatively established as such by the Court of Appeal in 1935 in R. v. Child [1935] N.Z.L.R. 186; and it should not at this stage be given another meaning by the Courts.

B. Alternatively, and in any event, that on the proper construction of the New Zealand statute, the view expressed by the Court of
30 Appeal of New Zealand on the meaning of the word "frequents" in R. v. Child and in the present case is correct.

10. As to A: The New Zealand Court of Appeal in R. v. Child decided that, depending on the circumstances, one visit could be sufficient to support a finding of "frequenting" in terms of the statute. That decision has stood, and been followed, down to the present time. The law may develop differently in different parts of the
40 Commonwealth and this settled meaning of the word "frequenting" in the New Zealand statute should not be changed by the Courts. If it is to be changed it should be changed by the legislature.

RECORD

11. As to B: The decided cases on statutes in pari materia indicate some uncertainty as to what conduct is embraced by the word "frequents". The legislative history of the New Zealand Statute, when considered in relation to those cases, shows that the view of the Court of Appeal as to the meaning of the word is correct. In particular the first relevant New Zealand statute did not contain a particular element of "loitering" nor was "loitering" introduced to it as a separate matter as was done in the United Kingdom by s.7 of the Penal Servitude Act 1891. The original New Zealand legislation, which was for all material purposes the same as the then current United Kingdom legislation, has been consolidated three times culminating in the Police Offences Act 1927 but the language has remained the same. 10

12. The Respondent contends that this appeal should be dismissed and the appellant's conviction affirmed for the following amonsts other 20

REASONS

(1) That the direction of the learned trial judge on the element of frequenting in s.52(1)(j) of the Police Offences Act 1927 was in accordance with law; and

(2) that the decision of the Court of Appeal of New Zealand on the proper construction of the word "frequents" in that section was correct. 30

R.C. Savage, Q.C.

D.P. Neazor

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B E T W E E N :

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-and-

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