NAGAPPA CHETTY *v.* SILVA.

P. C., Ratnapura, 19,778.

1901.
February 25

House-breaking—Recent possession of goods removed from house broken into—Presumption of not only theft, but of the manner in which theft was committed—Jurisdiction of Police Magistrate.

Where a house was broken into and the goods removed therefrom were found soon after in the possession of the accused, and footsteps were traced from behind the house broken into to a place behind the accused's house,—

Held, per BROWNE, A.J.—That the accused's recent possession of the goods was presumptive evidence of not only theft, but also of theft by house-breaking, and that therefore the Police Magistrate could not deal with the case summarily for theft or dishonest receipt.

THE facts of the case appear in the judgment of Browne, A.J.

H. J. C. Pereira, for appellant.

Peiris, for respondent.

25th February, 1901. BROWNE, J.—

On the night between the 4th and 5th January last a hole was made under the frame of the back door of a Chetty's boutique at Tiruwanaketiya, the door was unbarred, and twenty bags of salt

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and six tins of various oils were bodily carried away. There is evidence that, there having been rain that night, footsteps were found leading from behind complainant's boutique to behind accused's boutique, making a new track on the river side of the road, and that on searching accused's boutique there was found a small upper storey or loft partitioned from a larger one and capable of being entered by an aperture two feet square on the level of its floor, which aperture was at first not discernible owing to the straw being piled on the larger loft; and that in this smaller room were salt bags and oil tins, which, despite absence of trade marks, complainant swore were his property.

The Police Sergeant reported to the Court that accused dishonestly retained this property, and the Magistrate has convicted them of this offence. Neither of them apparently has studied the distinction made by Withers. J., in *Banda v. Henaya, 2 N. L. R. 4*, between dishonestly receiving and dishonestly retaining any stolen property: namely that the former arises when the property is received, despite knowledge at that time that the theft has been committed, and that the latter arises when the knowledge of the theft comes after an honest and innocent receipt of the property. Indeed, in this case, if the evidence be all true and the identification certain, the recent possession is presumptive evidence of theft rather than of dishonest receiving. But there is no presumption of dishonest retaining made by section 114 of the Evidence Ordinance *2 N. L. R. 4; Hanifa v. Baudirale, 3 N. L. R. 267; Koch, 31, 38*).

But the presumption of theft thence arising may extend even to the manner in which the theft was committed, *e.g.*, of robbery; though, if the violence used in the robbery resulted in the death of the victim, it would be only evidence of the guilt of murder, but not presumptive evidence thereof. (*Field, p. 516*, citing *Queen Empress v. Sami, I. L. R. 13, Mad. 432.*) Withers, J., in *Gunasekera v. Thegis, 2 N. L. R. 197*, said (in a case where accused was found in possession of a chair which had been removed from a house where a door had been forced open four months previously), "If an inference is to be drawn from the fact of his "possession, it is that he stole it in the commission of house-"breaking, an offence which the Magistrate was not competent to "try." Lawrie, J., did not concur therein in 4,373, P. C., Panadure (*S. C. M. 12th September, 1898*), but I consider the Magistrate should, ere he convicted in this case, have requested the directions of the Attorney-General; and as the conviction cannot be sustained, I set it aside and direct the case to be forwarded to the Attorney-General.