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PERERA *v.* SILVA.

P.C., Colombo, 85,630.

Dishonest retention of stolen property—Innocent receipt in the first instance—Evidence of theft and dishonest retention—Penal Code, s. 394.

MIDDLETON, J.—I cannot concur with Withers, J., in the opinion (expressed in *Hanifa v. Bandirala, 3 N. L. R. 267*) that the offence of dishonest retention of stolen property implies an innocent receipt in the first instance; but a dishonest retention may be complete without any guilty knowledge at the time of receipt.

Where it was proved that the goods seized in possession of the accused were the property of Whiteaway, Laidlaw & Co.; that they were quite new, and were not sold to the accused; that the accused was employed in the shop of Whiteaway, Laidlaw & Co.; that he admitted that the goods came from their shop; that he did not make good his statement that he had bought the goods there, and that he is in possession of other new goods which another shopkeeper claimed,—

Held, that upon these facts it was reasonable to conclude that the goods in question were stolen from Whiteaway, Laidlaw & Co.; and that the accused knew them to be stolen goods and dishonestly retained them.

THE accused was convicted of dishonestly retaining certain stolen property belonging to Messrs. Whiteaway, Laidlaw & Co., and knowing the same to be stolen property.

The complainant, a police constable, said that seeing a boy hand a watch to the accused in York street, Colombo, he walked up to the accused, and as he knew him to be an employee at Whiteaway, Laidlaw & Co.'s shop arrested him on suspicion, left him at the police station and went to Whiteaway Laidlaw Co.'s with the watch, where the manager claimed it. The complainant then went with the accused to his house in Kotahena, and on search made found in an almirah opened by the accused a hat, a pair of boots, two watches, and other articles, which were all claimed by Whiteaway, Laidlaw & Co. The prosecution could not prove that any of the articles found were stolen on any particular day.

The Magistrate Mr. W. E. Thorpe gave the following judgment:—

"The articles produced are quite new. Three new watches, a new terai hat, and a new pair of boots, which all belong to Whiteaway, Laidlaw & Co. At the same time one terai and two panamas

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were found in the accused's almirah, which he admits came from the Apothecaries' Company. It is unusual for a person of the position of the accused to own two new terai hats, two new panamas, and three new watches. The fact that he has them wants explanation. The accused is an employee of Whiteaway, Laidlaw & Co., and has access to all of these things. As it is impossible to swear that any of the things was stolen on any particular day, a charge under section 370 for recent possession would necessarily fail. I have therefore charged him under section 394. The accused is unable to give any satisfactory explanation. On the 5th March he said he bought them from the firm, and that he would call the assistants who sold them to him as his witnesses. But he does not call them. He produces three bills of Whiteaway, Laidlaw & Co., of which two are admittedly genuine, but they do not refer to any of the articles produced in Court. The accused has failed to show that he bought these articles. He has not called the shop assistants. He admits the articles came from Whiteaway, Laidlaw & Co. I have no doubt that they were stolen, and that the accused has retained them knowing that they were stolen, though the exact date of the theft cannot be proved ".

The accused appealed. The case was argued on 30th March, 1904, before Middleton, J..

Dornhorst, K.C., for appellant.—The accused is charged with dishonest retention of stolen property. Such a charge implies that he came by it innocently (*Hanifa v. Bandirala, 3 N. L. R. 267*). The attempt to prove that he himself stole it is therefore contradictory of the charge. Such evidence is not admissible against him. There is no evidence that the property was at all stolen from Whiteaway, Laidlaw & Co. The accused is entitled to an acquittal.

Wijeykoon, for respondent.—There is evidence of theft by somebody, who may be either the accused himself or some one else. It is well proved that, whoever stole the property, the accused had possession of it and continued in possession dishonestly.

Cur. adv. vult.

12th April, 1904. MIDDLETON, J.—

The accused in this case was convicted of dishonestly retaining certain goods, the property of Whiteaway, Laidlaw & Co., stolen from them, knowing the same to be stolen, under section 394 of the Penal Code.

The points taken before me on behalf of the accused were—first, that there was no evidence to show that the goods were in fact

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stolen; second, that an offence under section 394 implied an honest receipt followed by a subsequent dishonest retention, and Withers, J. 's judgment in a case reported in *3 N. L. R., p. 267*, was relied on. The accused was first charged with stealing, but the charge was altered to one under section 394.

As regards the first point, the evidence shows that the goods were the property of Whiteaway, Laidlaw & Co., that they cannot say they were stolen at any particular time; that they were found in the possession of accused; that they were not sold to the accused; that the accused alleged they were sold to him; and that he was employed in the shop of that firm. In the ordinary course of business goods do not leave a shop unless they are sold to some one. The infirmative hypothesis that they were sold to some one else or sent out for sale elsewhere is rebutted by the accused's statement that he purchased them himself.

It is not an unreasonable presumption upon these facts to say that they were stolen from the shop by some one, and I think any jury would find so upon those facts.

The accused stated that he bought them within the last three months and produced slips to show it, which do not refer to them, and proposed to call shopmen who sold the goods to him, but afterwards declined to do so. There is no direct evidence to prove that he actually stole them, although this perhaps might be inferred, but the evidence shows that his statement as to how he became possessed of them is untrue, that he was dealing with one of the watches in a suspicious fashion, and he is in possession of other new goods claimed by another firm, which, to my mind, is evidence of guilty knowledge. Upon these facts, I think, the accused was properly convicted under section 394.

As regards the point that the offence of dishonest retention implies an innocent receipt in the first instance. I cannot concur in this. A man might both receive and detain dishonestly, and even if in this case the accused did receive these goods dishonestly, he certainly also detained them dishonestly. I would agree that a dishonest retention may be complete without any guilty knowledge at the time of reception (*Madras H. C. Rulings, in 4, Madras H. C. Reports, Appendix, p. xlii*).

I therefore affirm the conviction.