EKANAYAKE

v.

ATTORNEY-GENERAL

SUPREME COURT.
WANASUNDERA, J., L. H. DE ALWIS, J. AND O. S. M. SENEVIRATNE, J.
S.C. APPEAL No. 68/86.
C.A. No. 132/84.
H.C. COLOMBO 1203/83.
DECEMBER 7, 8 AND 9, 1987.

Criminal Law–Offences Against Aircraft Act No. 24 of 1982 ss. 17(1), 19(1) and 19(3)(d)–Dishonest retention of stolen property–Penal Code s. 394–Meaning of 'in relation to' in s. 19(3)(d) of Act No. 24 of 1982–Conventions as an aid to interpretation–Jurisdiction–Judicature Act No. 2 of 1978 ss. 9(1)(f), 39–Extortion committed outside Sri Lanka–Can extortionist himself be tried for retention in Sri Lanka?–Misjoinder.

The appellant a Sri Lankan citizen married an Italian lady and had a son by her but was unable to secure permission to live and work in Italy. As part of his plan to reunite with his family and reimburse himself his expenses he boarded an Alitalia plane at Delhi and when the aircraft was in flight headed for Bangkok threatened the captain that he would blow up the plane and forced him to communicate with the Italian Government to bring down his Italian wife and son with 300,000 U.S. dollars to Bangkok. At Bangkok on being reunited with his wife and son and receiving the 300,000 US dollars he released the plane. Thereafter he flew to Sri Lanka with his wife and son and deposited 280,000 U.S. dollars in his account in the Bank of Ceylon. Later he was indicted in the High Court of Colombo with having committed an offence under section 17(1)(a) read with sections 19(1) and 19(3)(d) of the Offences Against Aircraft Act No. 24 of 1982 and retention of stolen property under s. 394 of the Penal Code and found guilty on both counts. In appeal to the Court of Appeal the sentence on the first count was varied. He then appealed to the Supreme Court where the jurisdiction of the High Court to try the case was challenged. A plea of misjoinder and whether a charge of retention can be levelled against the extortionist himself were also raised.

Held:

(1) Section 19(3)(d) of Act No. 24 of 1982 vests jurisdiction in respect of the acts referred to in s. 17(1)(a) to (e) in relation to a foreign aircraft. The words 'in relation to' include acts committed on board the aircraft also. The words 'in relation to' as used in s. 19(2)(d) mean "in respect of" although in other parts of the section the words used are "on board or in relation to". This interpretation must be given in order to give the words a rational sense which is consonant with the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of December 16, 1970 (Articles 1, 2 and 4).

(2) Section 9(1)(f) of the Judicature Act No. 2 of 1978 confers jurisdiction on the High Court to try Sri Lankans for offences committed outside Sri Lanka or on board or in relation to any ship or aircraft of whatever category. Moreover section 39 of the Judicature Act bars objection to jurisdiction by an accused person who has already pleaded and taken part in the trial.

(3) Where theft (or extortion) has been committed in a foreign country it is possible to charge the thief or (the extortionist) himself in Sri Lankan courts with dishonest retention of the property so stolen or extorted.

(4) The acts for which the accused was charged under the Offences Aganist Aircraft Act No. 24 of 1982 and retention of stolen property were connected so as to form the same transaction. The main test is continuity of action.

Cases referred to:

1. *Burns Philip & Co., v. Nelson & Robertson [1958] 1 Lloyd's Reports 342.*
2. *Salomon v. Customs & Excise Commissioners [1967] 2 QB 116.*
3. *Cramas Properties Ltd., v. Connought Fur Trimmings Ltd. [1965] 1 WLR 892, 897 (H.L.)*
4. *Gartside v. Inland Revenue Commissioner [1968] AC 553, 612.*
5. *Emperor v. Baldowa [1906] 1LR 28 All 372.*
6. *King Emperor v. Johri [1906] 1LR 23 All 266.*
7. *Queen Empress v. Abdul Latiff [1885] LLR 10 Bom. 186.*
8. *Empress v. Sunker Gope [1881] 1LR 6 Cal 307.*
9. *Emperor v. Shorufalli Allibhoy ILR 27 Bom. 135, 138.*
10. *Krushnamurthy v. Abdul Subbani AIR 1965 Mysore 128.*

APPEAL from Judgment of the Court of Appeal.

Dr. Colvin R. de Silva with *Ran Banda Seneviratne, Dhammika Yapa, Miss Chamantha Weerakoon* and *M. L. S. Jayawardena* for appellant.

Upawansa Yapa, Deputy Solicitor-General with *N. A. Amaratunga SSC* for Attorney-General.

Cur. adv. vult.

January 14, 1988.

L. H. DE ALWIS, J.

The appellant was indicted in the High Court of Colombo on the following two charges:

1. That between 29th June 1982 and 1st July 1982 on board a foreign aircraft namely, Alitalia Boeing 747 No. AZ 1790 whilst in flight between New Delhi and Bangkok he did unlawfully by threats intimidate the pilot of the said aircraft that if his demands

were not met he would blow up the aircraft with all on board by the use of explosives and that he did take control of the aircraft unlawfully by force or threat and thereby committed an offence punishable under section 17 (1) (*a*), read with sections19 (1) & 19(3)(*d*) of the Offences Against Aircraft Act No. 24 of 1982.

2. That between the 1st of July 1982 and 3rd July 1982 in Colombo within the jurisdiction of this Court and in the course of the same transaction as in count (1) he did retain 297,700 U.S. dollars dishonestly knowing the same to be stolen property and thereby committed an offence punishable under Section 394 of the Penal Code.

The appellant was tried in the High Court of Colombo without a jury and was found guilty and convicted on both counts. He was sentenced to a term of simple imprisonment for life on the first count and to a term of three years' rigorous imprisonment on the second count, both sentences to run concurrently.

The appellant appealed to the Court of Appeal which affirmed his conviction but varied his sentence to a term of five years' rigorous imprisonment on the first count and to a term of two years' rigorous imprisonment on the second count, both sentences to run concurrently.

The appellant having obtained leave, now appeals to this court from the conviction and sentence imposed by the Court of Appeal.

The facts relevant to the appeal are briefly as follows:

The appellant is a Sri Lankan citizen married to an Italian lady with whom he lived in Italy with their son. The appellant was required to obtain permission to continue to live and work in Italy and for this purpose had to come to Sri Lanka to interview the Ambassador for Italy in Sri Lanka. After numerous visits to the Embassy he was finally refused re-entry to Italy where his wife and son continued to live. In this plight the appellant, as the evidence discloses, devised a plan in order to be re-united with his family and to recover the expenses he had been put to. He boarded Alitalia Boeing AZ 1790 plane belonging to the Italian Government on 29.6.1982 at Delhi. The plane was on a scheduled flight from Rome to Tokyo. After the plane took off for its next stop at Bangkok, the appellant both in writing and orally ordered the Captain of the plane to communicate with the Italian Government to make arrangements to fly his wife and son to meet him at Bangkok

and also to pay him 300,000 U.S. dollars. He threatened the Captain of the aircraft that if this was not done, he would blow up the plane with explosives which he pretended to have with him. He had hung round his neck a couple of torch batteries connected with wires to give the impression that it was some explosive device. The Captain of the plane under fear of this threat, which was likely to endanger the safety of the passengers in his plane, took the necessary steps to meet these demands. From that point onwards the appellant issued directions to the Captain regarding the movements of the plane and exercised control over it. The captain was compelled to land the plane at Bangkok although he had received official instructions to proceed to another airport.

The plane landed in Bangkok at about 4.30 a.m. on 30.6.82 but nobody was allowed to disembark on the instructions of the appellant, until he received a message that his wife and son had arrived from Rome.

On 1.7.82 at about 7 or 8 a.m. a message was received that the appellant's wife had arrived and that 300,000 U.S. dollars had been brought. At about 9 a.m. on 1.7.82 the appellant's wife boarded the plane and the appellant agreed that if his wife and child were handed over to him along with the money and a pass, he would release all the passengers. Thereafter his wife got off the plane and obtained the money from the General Manager of Alitalia for the Far East and signalled to the appellant that it was all right. The passengers were then permitted to disembark. The appellant himself then gave up control over the aircraft and disembarked followed by the Captain of the plane.

The appellant with his wife and child set off for Colombo on an Air Lanka flight and arrived in Colombo at 10.30 p.m. the same day. At Colombo he was allowed to go through the customs with the money. On 3.7.82 the appellant deposited 280,000 U.S. dollars in his account at the Bank of Ceylon. He and his family stayed in Colombo at the Hotel Inter Continental from 1.7.82 till 3.7.82 and then left for his home in Ahangama by car. On the way home he was arrested and detained at the Galle Police Station.

Dr. de Silva's first contention was that the High Court at Colombo had no jurisdiction to try the appellant on count (1) of the indictment because section 19(3)(*d*) of the Offences Against Aircraft Act No. 24

of '82 vests the High Court with jurisdiction only where the act constituting the offence is committed 'in relation to' a foreign aircraft. The act referred to in section 17(1)(*a*) read with section 19(1) was the seizing or exercising of control of the aircraft, and the words 'in relation to', it was submitted, meant that the act must be committed from outside the aircraft and not 'on board' which means, inside the aircraft. In the present case the act of seizing control of the aircraft on its flight from Delhi to Bangkok was admittedly committed inside the aircraft or 'on board' it, and not in 'relation to' the aircraft or from outside it, and therefore the High Court at Colombo was deprived of jurisdiction to try that act which constituted an offence under section 19(3)(*d*).

It is necessary to reproduce the relevant parts of sections 17 and 19 of the Act.

The marginal note to section 17 reads as follows:

"Offences on board or against aircraft".

Section 17(1) states that:

"Any person who–

(*a*) on board a Sri Lanka aircraft in flight, unlawfully by force or threat thereof or any other form of intimidation, seizes or exercises control of that aircraft:

(*b*) unlawfully and intentionally performs any such act of violence against a person on board a Sri Lanka aircraft on flight as is likely to endanger the safety of that aircraft; or

(*c*) unlawfully and intentionally destroys a Sri Lanka aircraft in service; or

(*d*) unlawfully and intentionally causes such damage to a Sri Lanka aircraft in service as renders it incapable of flight; or as is likely to endanger its safety in flight; or

(*e*) unlawfully and intentionally places or causes to be placed in a Sri Lanka aircraft in service by any means whatsoever, any device or substance which is likely to –

(i) destroy that aircraft; or

(ii) cause such damage to it as to render it incapable of flight or as is likely to endanger its safety in flight; or

(*f*) unlawfully and intentionally causes such damage or destruction to, or makes such interference with the operation of, any air navigation facilities used in international air navigation as is likely to endanger the safety of a Sri Lanka aircraft in flight; or

(*g*) unlawfully and intentionally communicates information which he knows to be false endangering the safety of a Sri Lanka aircraft in flight,

shall be guilty of an offence under this Part of this Act and shall be liable, on conviction after trial before the High Court holden at Colombo, to imprisonment for life.

(2).....

(3) An offence under this Part of this Act shall be tried before the High Court holden in the judicial zone of Colombo.

Section 19(1) states that:

"Any person, whether he is a citizen of Sri Lanka or not, who commits, *on board*, or *in relation to*, a foreign aircraft, outside Sri Lanka, any act referred to in paragraph (*a*) or paragraph (*b*) or paragraph (*c*) or paragraph (*d*) or paragraph (*e*) or paragraph (*f*) or paragraph (*g*) of subsection (1) of section 17 shall be guilty of an offence under this Part of this Act and shall be liable, on conviction after trial before the High Court, to imprisonment for life.

(2).....

(3) No Court in Sri Lanka shall have jurisdiction to try an offence under this section except in the following cases, that is to say:

(*a*) Where the act constituting the offence is committed in Sri Lanka; or

(*b*) Where the foreign aircraft *on board* which, or *in relation to* which, the act constituting the offence is committed lands in Sri Lanka with the alleged offender on board; or

(*c*) Where the foreign aircraft *on board* which, or *in relation to* which, the act constituting such offence is committed, has been leased without crew, to a lessee who has his principal place of business in Sri Lanka, or (if he has no such place of business), has his permanent residence in Sri Lanka; or

(*d*) Where the act constituting such offence is an act referred to in paragraph (*a*) or paragraph (*b*) or paragraph (*c*) or paragraph (*d*) or paragraph (*e*) of subsection (1) of section 17 committed *in relation to* a foreign aircraft, or the attempt to commit or the abetment of the commission of, any such act, if the person committing such act is present in Sri Lanka. The marginal note to section 19 reads as follows:

"Acts committed *on board*, or *in relation to*, a foreign aircraft deemed to be offences. (The underscoring in sections 17 and 19 is mine).

A comparison of section 17 with section 19 clearly indicates that section 17 relates to acts committed in respect of Sri Lanka aircraft by any person or anywhere, whether 'on board' or 'against it', and the High Court at Colombo has jurisdiction to try the acts constituting the offences, inasmuch as the aircraft is a Sri Lanka aircraft.

Section 19 on the other hand, relates to foreign aircraft and makes the same acts referred to in section 17 offences, whether committed by a citizen of Sri Lanka or any other national and whether 'on board' or 'in relation to' the aircraft, although committed outside Sri Lanka.

Dr. de Silva's argument is that section 19(3)(*d*) which vests jurisdiction in our courts, relates only to acts referred to in section 17(1)(*a*) to (*e*) if committed 'in relation to' the foreign aircraft and not 'on board it'. According to learned Counsel the phrase 'in relation to' means from outside the aircraft and not 'on board it'. Since the alleged act in this case, is the seizing of control of the aircraft and was admittedly committed 'on board' the foreign aircraft on flight from Delhi to Bangkok, the High Court of Colombo lacked jurisdiction to try the offence.

I regret, I cannot agree with learned Counsel.

It will be noted that paragraphs (*b*) and (*c*) of section 19(3), both commence with the words, "where the foreign aircraft *on board* which or *in relation to* which the act constituting the offence is committed .....". But paragraph (*d*) is couched in different language. It begins with the words "where the act constituting *such offence* is an act referred to in paragraph (*a*) or paragraph (*b*) or paragraph (*c*) or paragraph (*d*) or paragraph (*e*) of subsection (1) of section 17, committed *in relation to* "a foreign aircraft". (The emphasis is mine).

The words "such offence" in the jurisdictional section 19(3)(*d*) relate back to the acts mentioned in section 19(1) which fall within paragraphs (*a*) to (*e*) of section 17(1), the commission of which constitutes an offence. The acts referred to in section 19(1) relate to acts committed both 'on board' or 'in relation to' a foreign aircraft. In my view, therefore, the phrase 'in relation to' occurring in section 19(3)(*d*) bears a different meaning to that used in sections 19(1), 19(3)(*b*) and 19(3)(*c*).

In the context of section 19(3)(*d*) the words "in relation to" a foreign aircraft mean in my view, nothing more than "in respect of" a foreign aircraft and include acts committed both "on board" or "in relation to" the aircraft in terms of section 19(1) read with section 17(1).

Where a particular enactment is ambiguous, it was held by the High Court of Australia, to be permissible to refer to an international convention. *Burns Philip Co., v. Nelson & Robertson* (1) reported in *Craies* on Statute Law 7th Ed. Page 132. In *Salomon v. Customs and Excise Commissioners* (2) the Court of Appeal held that where there is clear evidence of an enactment being the indirect offspring of a Convention, the Convention might be resorted to in the interpretation of the enactment even where the Convention is not specifically mentioned in the enactment.

In the present case, the Conventions which are implemented by the Offences Against Aircraft Act No. 24 of 1982 are specifically mentioned in the Preamble to the Act. It states "An Act to give effect to certain Conventions relating to the safety of Aircraft to which Sri Lanka has become a party, namely–

(*a*) The Convention on offences and certain other acts committed on Board Aircraft, signed at Tokyo on September 14, 1963.

(*b*) The Convention for the suppression of unlawful seizure of Aircraft, signed at the Hague on December 16, 1970 and

(*c*) The Convention for the suppression of unlawful acts against safety of Civil Aviation signed at Montreal on September 23, 1971."

Section 1(3) of the Act declares that the provisions of Part II of the Act (which contains sections 17 and 19) shall be deemed for all purposes to have come into operation on July 3, 1978 being the date on which the Hague and Montreal Conventions entered into force in respect of Sri Lanka. The provisions of Part II of the Offences Against Aircraft Act No. 24 of 1982 containing sections 17 and 19, thus came into operation with retrospective effect from July 3, 1978 and were deemed to be in force at the time the offence was alleged to have been committed by the appellant between 29.6.82 and 1.7.82.

The Convention relevant to this case is the Hague Convention which by Article 1 defined an aircraft offence as follows:

"Any person who *on board* an Aircraft in flight:

(*a*) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of that aircraft, or attempts to perform any such act; or

(*b*) .....

Article 2 states that, "Each contracting State undertakes to make the offence punishable by severe penalties."

Article 4(2) states that "Each contracting State shall take such measures, as may be necessary to establish its jurisdiction over the offence in the case where the offender is present in its territory and it does not extradite him...."

In compliance with this country's obligation under Article 2 of the Hague Convention, section 19(1) was enacted to make the act referred to in section 17(1)(*a*) an offence when committed "on board" a foreign aircraft, outside Sri Lanka, and by Article 4(2), section 19(3)(*d*) was introduced to vest the High Court with jurisdiction to try the offence, where the alleged offender is present in Sri Lanka.

As Diplock LJ said in *Saloman v. Commissioners of Customs and Excise (Supra)* "But if the terms of the legislation are not clear but are reasonably capable of more than one meaning, the treaty (convention) itself becomes relevant, for there is a prima facie presumption that Parliament does not intend to act in breach of international law,

including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligation and another or others not, the meaning which is consonant is to be preferred.

Applying this presumption to the facts of the present case it would appear that the legislature was implementing the country's obligations under Article 4(2) of the Hague Convention in vesting the High Court with jurisdiction over the act constituting the offence, as referred to in paragraph (a) of section 17(1) committed 'in relation to' a foreign aircraft; that is, seizing or exercising control of the foreign aircraft in flight, unlawfully by force or threat *on board it*. 'On board' may be the location of the commission of the act but it is an ingredient of the act which constitutes the offence.

It is no doubt an ordinary canon of interpretation that a word keeps the same meaning at least throughout in the Act. When the same word is used in the same context in the sections of the same enactment it is reasonable to suppose that it is used in the same sense in both. *Bindra–Interpretation of Statutes,* 6th Ed. page 258.

Maxwell on Interpretation of Statutes, 12th Ed. page 278, says:

> "It is, at all events reasonable to presume that the same meaning is implied by the same expression in every part of the Act." But he cautions that this presumption as to identical meaning is not of much weight. "The same word may be used in different senses in the same statute and even in the same section."

"The proper rule of construction", according to Bindra, "is to look at the section itself and find out the meaning of a word in question from the context in which it is used. It is clear that the same word might carry different meanings when used in different parts of the statutes depending upon the context in which it is used. The meaning is actually controlled by the context. Words in a statute must not be read in isolation but structurally and in their context, for their significance may vary with their contextual setting. The context and object intended to be achieved by the legislature may indicate that the word was not intended to be used in the same sense throughout the statute," *Bindra* Page 254.

In *Cramas Properties Ltd., V. Connought Fur Trimmings Ltd.* (3), Lord Reid said:

"There is undoubtedly a presumption that Parliament (or the draftsman) will use the same or similar language throughout an Act when meaning the same thing. But this presumption is only a presumption and one must always remember that the object in construing any statutory provision is to discover the intention of Parliament and that there is an even stronger presumption that Parliament does not intend an unreasonable or irrational result."

In *Gartside v. Inland Revenue Commissioner,* (4) Lord Reid again said:

"It is always proper to construe an ambiguous word or phrase in the light of the mischief which the provision is obviously designed to prevent and in the light of the reasonableness of the consequences which follow from giving it a particular construction." "If the language", he said elsewhere, "is capable of more than one interpretation, we ought to discard the more natural meaning if it leads to an unreasonable result and adopt the interpretation which leads to a reasonable practical result."

In the present case the phrase 'in relation to' in section 19(3)(d), read in the context of that section, bears, in my view, a different meaning to the same phrase, when juxtaposed with the words "on board", in section 19(1) or 19(3)(b) and (c). The intention of the legislature was to give effect to Article 4(2) of the Hague Convention by establishing the jurisdiction of our Courts over the offence. Interpreting the phrase "in relation to" in this context to mean 'in respect of' a foreign aircraft leads to reasonable and rational consequences, namely, vesting our courts with jurisdiction over offences described in section 19(1) whether committed 'on board' or 'in relation to' a foreign aircraft, where the offender is in Sri Lanka. There appears to be no rational basis for the legislature to have restricted the jurisdiction of our courts only to those acts committed 'in relation to' a foreign aircraft, in the sense contended for, to the exclusion of acts committed 'on board' it.

Be that as it may, section 9 (1)(f) of the Judicature Act No. 2 of 1978 vests the High Courts of this country with jurisdiction to try any offence whether committed 'on board' or 'in relation to' any aricraft by a citizen of Sri Lanka.

Section 9(1)(f) reads as follows:

"The High Court shall ordinarily have the power and authority and is hereby required to hear, try and determine in the manner provided for by written law all prosecutions on indictment instituted against any person in respect of–

(f) any offence wherever committed by any person, who is a citizen of Sri Lanka, in any place outside the territory of Sri Lanka or on board or in relation to any ship or aircraft of whatever category."

The appellant is a citizen of Sri Lanka and the offence was committed, between 29th of June and the 1st July 1982. The Judicature Act came into operation on 2.7.79 and was in force at the time of the commision of the offence. The Offences Against Aircraft Act No. 24 of 1982 was certified on 26.7.1982, but the provisions of Part II within which sections 17 and 19 fall, were by section 1(3) deemed for all purposes to have come into operation on July 3, 1978. Even if the interpretation as contended for by learned Counsel for the Appellant is given to the phrase 'in relation to' in section 19(3)(d), the Judicature Act being the later statute in respect of the relevant provisions, will prevail over sections 17 and 19 of the Offences Against Aircraft Act and the High Court will have jurisdiction to try the offence committed by the appellant, 'on board' the foreign aircraft on flight to Bangkok.

Learned Counsel contended that section 9(1)(f) cannot be used to negate section 19(3) of the Offences Against Aircraft Act because the "written law" referred to in section 9(1) of the Judicature Act is that found in the Offences Against Aircraft Act. I do not agree. The 'written law' referred to in section 9(1) of the Judicature Act is the law setting out the procedure or manner for trying such prosecutions on indictment and is untouched by section 19 of the Offences Against Aircraft Act.

It was further argued that under the Judicature Act the jurisdiction of the High Court is subject to section 9(2)(b) which requires the President of the Court of Appeal to nominate in writing under his hand, the High Court which should try the offence referred to in paragraph 9(1)(f) and as this had not been done, the High Court holden in Colombo had no jurisdiction to try count (1). There is no doubt that the High Court has jurisdiction to try the offence. But no objection was raised by the appellant at the trial to the failure of the President of the

Court of Appeal to nominate the High Court holden at Colombo to try the offence. Instead, the appellant pleaded to the charge, and participated throughout the entire trial. Section 39 provides that "whenever any defendant or accused party shall have pleaded in any action, proceeding or matter brought in any court of first instance, neither party shall afterwards be entitled to object to the jurisdiction of such court, but such court shall be taken and held to have jurisdiction over such action, proceeding or matter." In the present case the appellant, submitted to the jurisdiction of the High Court of Colombo by pleading to the indictment and participating in the trial without objection. It is now not open to him to object to the jurisdiction of the High Court of Colombo to try the offence.

Learned Counsel's submission in regard to the lack of jurisdiction of the High Court of Colombo to try count (1) must fail.

Learned Counsel's next contention was that the appellant could not have been convicted on count (2), with retention of part of the stolen property viz: 297,700 U.S. dollars because on his own admission he was himself the thief or extortionist. As such he submitted, count 2 must fail. Stolen property is defined in section 393 of the Penal Code as follows:

> "Property, the possession whereof has been transferred by theft, or by extortion, or by robbery, or by forgery or by cheating and property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed, is designated as "stolen property" whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without this Island. But if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property."

Dishonestly receiving stolen property is defined in section 394 of the Penal Code as follows:

> "Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

Gour, *Penal Law of India,* 10th Ed. Vol. IV at Page 3597 says:

"The collation of 'receipt and retention' are obviously intended to do away with the necessity of proving the presence of dishonesty at the time of its first possession. It has been said that dishonest retention is contra-distinguished from dishonest receipt and that in the former case dishonesty supervenes after the act of acquisition. Every person who retains possession of property dishonestly possesses and continues to possess it dishonestly, so long as he retains it dishonestly, but every person who possesses and continues to possess it dishonestly does not retain dishonestly within the meaning of section 411 (our section 393). Neither the thief nor the receiver of stolen property commits the offence of retaining such property dishonestly merely by continuing to keep possession of it; to constitute dishonest retention there must have been a change in the mental element of possession....."

At page 3581 he says:

"The question where the principal offence was committed is now immaterial for the present purpose. The result of this clause is that if a thief commits an offence, say in Nepal, he might be tried for the act in India as the receiver of stolen property, though he could not be tried here for theft without extradition. In such a case it is no defence for the accused that he is a foreign subject and that the property was stolen by himself, and that he was not, therefore liable to be tried, convicted and punished by the Indian court for theft; in short that he could not be convicted for an act indirectly for which he could not have been legally tried directly. The reply is that the offence of stolen property is a continuing one, and it is therefore, justiciable anywhere the offender may be found."

In *Emperor v. Baldowa,* (5) two persons, Baldowa, who was not a British subject and Radhua, who was, were committed to the court of sessions at Jhansi, (which was within British territory) it being alleged against them that they had committed a robbery in an adjoining Native State and had brought the stolen property into British territory. It was held that, though neither could be tried by the Sessions Judge of Jhansi for robbery, Baldowa because he was not a British subject, and Radhua because the certificate required by section 188 of the Code of Criminal Procedure was wanting, yet both might be tried for the

offence of retaining stolen property under section 411 of the Indian Penal Code. *King Emperor v. Johri* (6) was distinguished and *Queen Empress v. Abdul Latif* (7) was followed.

In *Johri's* case (supra) the facts pointed clearly to Johri being himself the thief and he was found in possession of the stolen bullock within the jurisdiction of the same State. It was held that section 411 of the Indian Penal Code does not apply to the person who is the actual thief. In distinguishing *Johri's* case, both Banerji and Richards JJ in *Baldowa's* case, took the view that Baldowa first committed an offence under the law of India, when he retained the stolen property in British India. If the theft had been committed in British India, there would have been no "retention" of stolen property within the meaning of the section.

In *Abdul Latif's* case (supra) the accused was a subject of a Native State (Janjira) and committed theft at Rajkot Civil Station which was not part of British India. He was found in possession of stolen property at Thana.

It was held that as the offence was not committed in British India, and as the accused was the subject of Janjira State, the sessions court at Thana had no jurisdiction to try him for theft under section 381 of the Indian Penal Code, but it was competent to try him for dishonest retention of stolen property.

In the *Empress v. Sunker Gope* (8) a Nepalese subject, having stolen cattle in Nepal, brought them into British territory, where he was arrested and sentenced to one year's rigorous imprisonment. It was held that he could not be charged for theft, but might be convicted of dishonestly retaining stolen property.

In the present case, the appellant extorted the 300,000 U.S. dollars at Bangkok which was outside the jurisdiction of the High Court of Colombo and this court had no jurisdiction to try him for extortion. But he first committed an offence under our law when he retained part of the stolen property, namely the money, in this country. Hence following the authorities cited above, I am of the view that the appellant was rightly charged in the High Court at Colombo with the retention of 297,700 U.S. dollars being part of the proceeds of the stolen property.

Finally it was contended by learned Counsel for the appellant that there was a misjoinder of charges in indicting the appellant with two different offences on counts 1 and 2, since they were not committed in the course of the same transaction.

Learned Counsel argued that the second transaction of retaining stolen property occurred after the first transaction of seizing control of the aircraft was completed. The object of taking control of the aircraft, it was submitted, was for the purpose of only getting down his family to Bangkok and to be reunited with them. This was completed in Bangkok when his family arrived there.

The extortion of the money, it was submitted, constituted a different transaction.

Section 175(1) of the Code of Criminal Procedure Act states that:

> "If in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person he may be charged with and tried for every such offence, and in trials before the High Court such charges may be included in one and the same indictment."

Whether the series of acts are so connected as to form the same transaction would depend on the facts and circumstances of each case.... It may be proximity of time and place, or continuity of action, or community of purpose and design or relation of cause and effect; or that of principal and subsidiary. *Sohani—The Code of Criminal Procedure* (India) 16 Ed. Vol. II page 1525.

In *Emperor v. Sherufalli Allibhoy* (9) it was held that "The real and substantial test for determining whether several offences are connected together so as to form the same transaction depends upon whether they are so related to one another in point of purpose or as to cause and effect or as principal and subsidiary acts, as to constitute one continuous action."

The consensus of judicial opinion is that the expression "same transaction" implies a community of purpose and a continuity of action.

In *Krishnamurthy v. Abdul Subbani and another* (10) it was held that in order that a series of acts be regarded as the same transaction, they must be connected together in some way as for instance by proximity of time, unity of place, unity or community of purpose or design and continuity of action..... The main test must really be continuity of action by which is meant the following up of some initial act through all its consequences and incidents until the series of acts or group of connected acts come to an end either by attainment of the object or by being put to an end or abandoned.

In the present case the appellant's own position is that he had been put to great expense and inconvenience in having to come back to Sri Lanka and visit the Italian Embassy on innumerable occasions to obtain a visa to re-enter Italy where his wife and child were living. Even after all his efforts, he was refused a visa. He then acted about a plan to seize control of an aircraft belonging to the Italian Government with a view to achieving the objects he had in mind. According to his Petition of Appeal to this court, he boarded Alitalia Boeing AE1790 plane on 29.6.1982 at Delhi when the plane stopped over on its flight from Rome to Tokyo. After the plane took off for its next stop at Bangkok, the appellant both in writing and orally ordered the captain of the plane to communicate with the Italian Government to get down not only his wife and son to Bangkok, but to pay him 300,000 U.S. dollars. He threatened that if this was not done he would blow up the plane with explosives which he induced the captain to believe he was carrying. Under the influence of this threat the Captain took steps to have the appellant's demands met. When the plane landed in Bangkok he was informed that his wife and son had arrived there and that 300,000 U.S. dollars had also been brought. At about 9 a.m. on 1.7.82, the appellant's wife boarded the plane and the appellant agreed that if he was given the money and allowed to go with his wife and son on a pass, he would release all the passengers in the plane. His wife got off the plane and was handed the money by the General Manager of Alitalia for the Far East. She checked the money and signalled to the appellant. It was only after he was satisfied that the money had been obtained that he released the passengers and got off the plane himself.

It is therefore quite clear that the extortion of the money was one of the objects of his seizing control of the aircraft and is so connected together with the other acts by community of purpose and continuity

of action as to form the same transaction which came to an end by the attainment of the object. The objection of misjoinder of these two charges must therefore fail.

For the reasons given, the judgment of the Court of Appeal affirming the convictions of the appellant by the High Court and varying the sentence imposed on him by the High Court is affirmed.

The Appeal is dismissed.

WANASUNDERA, J. – I agree.

SENEVIRATNE, J. – I agree.

Appeal dismissed.