EHELEPOLA
v.
OFFICER-IN-CHARGE, POLICE STATION, KANDY AND ANOTHER

SUPREME COURT
PERERA, J.,
ANANDACOOMARASWAMY, J. AND
BANDARANAYAKE, J.
S.C. APPEAL NO. 62/97
H.C. KANDY NO. 61/95
DECEMBER 19, 1997.
JANUARY 10, 1998.

Offences against Public Property Act, No. 12 of 1982 – Theft of Public Property – meaning of "Public Property" – Sections 3 and 12 of the Act – Section 366 of the Penal Code – Evidentiary value of the dock statement of accused.

Five accused including the appellant were convicted of theft of an underground cable drum belonging to Sri Lanka Telecom, an offence punishable under section 3 of the Offences against Public Property Act, No. 12 of 1982. In his judgment, the Magistrate observed that the dock statement made by appellant had no evidentiary value. In appeal, the High Court set aside the conviction and sentences imposed on the accused and ordered a retrial before another Magistrate.

Held:

1. The cable drum which was the subject matter of the charge of theft was "public property" within the purview of section 12 of the Offences against Public Property Act.

2. The Magistrate had misdirected himself when he stated that the dock statement made by the appellant had no evidentiary value.

Cases referred to:

1. *King v. Sittamparam* 20 NLR 257.
2. *The Queen v. Kularatne* 71 NLR 529.
3. *The Queen v. Mapitigama Buddharakhita* 63 NLR 433.

APPEAL from the judgment of the High Court, Kandy.

Mohan Peiris with *Ms. Nuwanthie Dias* for the appellant.

Buwaneka Aluvihare, S.S.C for respondents.

Cur. adv. vult.

April 3, 1998.

PERERA, J.

The petitioner and four others were charged in the Magistrate's Court of Kandy on the following counts :-

(*a*) That the petitioner with four others did on or about 6.4.1994 fraudulently remove from the possession of Ariyaratne Serasinghe of Werallagama an underground cable drum valued at Rs. 125,000/- belonging to the Department of Telecom and thereby committed an offence punishable under section 3 of the Protection of Public Property Act as amended by Act No. 76 of 1988.

(*b*) That the aforesaid persons did on or about the 6th of April, 1994, fraudulently dispose of the said underground cable drum belonging to the Department of Telecom which was in the possession of Ariyaratne Serasinghe and thereby committed an offence punishable under section 3 of the Protection of Public Property Act as amended.

After trial, the learned Magistrate found all five accused guilty on the 1st count and sentenced the accused to serve a term of six months rigorous imprisonment and imposed on each one of them a fine of Rs. 5,000/- in default six months' rigorous imprisonment.

All the accused appealed against the conviction and the sentences imposed to the High Court of the Central Province holden in Kandy. At the conclusion of the argument of the said appeal, the learned High Court Judge set aside the convictions and sentences imposed on the accused-appellants and ordered a retrial on the same charges against the accused-appellants before another Magistrate (vide P2).

The appellant-petitioner – hereinafter referred to as the appellant (the 2nd accused-appellant in the High Court appeal) has lodged the present appeal against the judgment of the High Court ordering a retrial in this case. No appeals have been filed by the other four accused to this Court.

Both counsel for the appellant and counsel for the State agreed that this was a fit matter to be decided upon the written submissions filed in this case.

This Court granted special leave to appeal to the appellant on the 9th of May, 1997 on the following questions :-

(1) Can the conviction for theft of public property be sustained in the absence of evidence that the subject matter of the transaction was public property?

(2) Can the conviction of the 2nd appellant for theft be sustained in the absence of evidence of any participation by him in the theft?

(3) Did the learned Magistrate misdirect himself when he held that the unsworn statement of the appellant from the dock was of no evidentiary value?

(4) Did the learned High Court Judge act correctly in sending the case for retrial, having held that the learned Magistrate was–

(*a*) wrong in disregarding the dock statement,
(*b*) the insufficiency of evidence to hold that the subject matter was public property, and
(*c*) the absence of the 2nd accused-appellant at the time the theft took place on 6.4.1994 in Kandy?

The first question arises for determination by this Court therefore is whether there is evidence to establish that the underground cable drum which was the subject matter of the theft constituted public property within the meaning of the definition set out in the Offences against Public Property Act, No. 12 of 1982.

The aforesaid Act defines **Public Property** as follows:-

"**Public Property** means the property of the government, any department, statutory board, public corporation, bank, co-operative society or a co-operative union."

Further this Act defines a Public Corporation in the following terms:-

> "**Public Corporation** means any corporation, board or other body which was or is established by any written law other than the Companies Ordinance with funds or capital wholly or partly provided by the government by way of grant, loan or otherwise."

It would also be relevant to advert to the preamble to the Sri Lanka Telecommunications Act, No. 25 of 1991, which reads thus:

> "To provide for:
> transfer of property, rights and liabilities of the Department of Telecommunications to the Corporation named Sri Lanka Telecom established by Order under section 2 of the State Industrial Corporations Act, No. 49 of 1957 . . ."

At the trial, the Deputy General Manager of the Sri Lanka Telecom, Merril Perera has testified to the effect that the Telecommunications Department was converted into a State Corporation in September, 1991. He has also identified the cable drum in question as the property of the Sri Lanka Telecom. It is his evidence that the Sri Lanka Telecom is a State Corporation which was previously a department of government. The testimony of Merril Perera stands uncontradicted on this matter.

Having regard to the evidence set out above and the definition of the term "Public Property" in section 12 of the offences against Public Property Act, No. 12 of 1982, I hold that sufficient evidence has been adduced to establish that the cable drum which was the subject matter of the charge of theft was indeed public property and falls within the purview of the said Act.

The next question on which leave has been granted by this Court is whether the conviction of the appellant on the charge of theft could be sustained in the absence of evidence of any physical participation on the part of the appellant in the actual theft itself in Kandy. It is the petitioner's contention that at all times material to the commission of the "alleged theft" he was in Colombo. The allegation is that the theft of this cable drum was committed at No 360, Werallagama, Padeniya in Kandy.

It was contended on behalf of the appellant that the offence of theft under the provisions of Offences against the Public Property Act has been given the same definition as in the Penal Code in terms of the amendment. It was counsel's submission that having regard to the evidence in this case, the prosecution has failed to prove a charge of theft against the appellant as there was no material to establish any participation on the part of the appellant in the commission of the alleged theft on 6.4.94.

The offence of theft is defined in section 366 of the Penal Code as follows :

The following ingredients have thus to be proved to establish the offence of theft:–

(*a*) an intention to take dishonestly

(*b*) any movable property

(*c*) out of the possession of any person

(*d*) without that person's consent

(*e*) moves that property

(*f*) in order to such taking.

The essential feature of the offence of theft undoubtedly is that it is an offence against possession as opposed to ownership.

Hence it is imperative to identify the person against whom the offence of theft has been committed or the possessor. Then if the evidence discloses that any person with the requisite intention moves any movable property out of the possession of the possessor in order to taking such property he commits the offence of theft.

"**Salmond** in his book on **Jurisprudence**" (12th ed. pp. 270-273) states thus:

> "I possess, roughly speaking, those things which I have; the things which I hold in my hand, the clothes which I wear, and the objects which I have by me. To possess them is to have them under my physical control."

"Now to say that something is under my control is not to assert that I am continuously exercising control over it. I can have a thing in my control without actually holding or using it at every given moment of time."

"All that is necessary is that I should be in such a position as to be able in the normal course of events to resume actual control if I want."

"The test then for determining whether a man is in possession of anything is whether he is in **general control** of it." at p. 273.

It would be necessary in the circumstances to briefly refer to the evidence adduced in this case. On 6.9.94 when witness Wijeratne, a driver attached to the Sri Lanka Telecom (who had been assigned the lorry 43-4949) has reported to the Telecom Office in Kandy after work, Wijeratne had been instructed by the first accused to proceed to Wattegama and collect a cable drum from the Telecom warehouse at Wattegama. He had complied with those instructions and when he brought the drum to Kandy, the 1st accused-appellant had instructed Wijeratne to transport this drum to Colombo on the following day –7.4.94 and to meet another Sri Lanka Telecom employee Ehelepola (the present appellant) near the Sugathadasa Stadium.

Accordingly when he reached Colombo on 7.4.94, he had met the appellant Ehelepola near the Sugathadasa Stadium. Ehelepola had been waiting there in a Hiace Van belonging to the Sri Lanka Telecom. The appellant had walked up to Wijeratne's vehicle and had inquired from him whether there was any message from Wickremasekera (the 1st accused) and Wijeratne had replied that the 1st accused had instructed him to hand over the drum to the appellant Ehelepola. The lorry had been driven to a place at Bloemendhal Road and the drum had been shifted from Wijeratne's lorry and loaded into a private lorry which was brought there by the appellant. Wijeratne had thereafter returned to Kandy.

According to Liyanawaduge, the Storekeeper of Sri Lanka Telecom warehouse at Wattegama, he was directed by the 1st accused on the telephone to issue a cable drum when witness Wijeratne's lorry calls for it at the stores, and as instructed by the 1st accused, he had ordered the release of the cable drum to Wijeratne.

The virtual complainant in this case is one Ariyaratne Serasinghe who at the time of the alleged theft held the office of Telecommunications Engineer, Central Province. It is his testimony that both the 1st accused and the warehousekeeper were answerable to him in regard to any issues from the warehouse. As regards all requisitions made by the 1st accused, it was Serasinghe who had immediate authority to sanction the same. The storekeeper was permitted to despatch goods only in respect of such requisitions as had been duly authorised by the complainant. The complainant however was answerable to the Deputy General Manager who was also the head of the North-Central Branch of the Sri Lanka Telecom. Requisitions could also be sanctioned by the Deputy General Manager, but it is therefore, clear that no movement of goods in the warehouse was possible without the sanction of the complainant being first obtained.

On the evidence adduced at the trial therefore it is manifestly clear that the complainant was in general control of the goods in the warehouse and therefore may rightly be said to have been in possession of the said goods.

According to the evidence, the warehousekeeper was answerable to the complainant. In point of fact the position of the warehousekeeper in relation to the complainant would be that of a clerk, agent or servant. The position is the same in regard to witness Wijeratne who transported the cable drum to Colombo.

Section 25 of the Penal Code provides thus:

> "When property is in the possession of a person's wife, clerk or servant on account of that person, it is in that person's possession within the meaning of the Penal Code".

Therefore, the warehousekeeper and subsequently, the driver Wijeratne had only custody in respect of the goods entrusted to him. In regard to this aspect of the matter, namely, the interpretation of section 25 of the Penal Code, Dr. G. L. Peiris observes thus:

> "The purpose of this provision is to obviate an anomaly which could otherwise have characterised the law governing theft. Where the master's property was in the keeping of his servant and the servant dishonestly converted the property to his own use, a

conviction of theft would not be possible against the servant if possession of the property was held to be with the servant. To eliminate this difficulty, the law construes the situation as involving merely custody in the servant, where the master retains the possession of the property derivatively through his servant".
(Vide offences under the Penal Code – Dr. G. L. Peiris, p. 372.)

In the present case, the movement of the movable property to wit the cable drum was caused as follows:

On the 6th of April, 1994, the 1st accused informed the warehouse-keeper of the Wattegama warehouse to despatch the impugned property to a team headed by the 3rd accused. The 1st accused was a District Telecommunications Inspector whose work came under the supervision of the complainant. Being an officer, he was vested with the implied authority to requisition goods from the Wattegama ware-house in the event of an emergency. The evidence however, discloses that there was no such emergency on the 6th of April, 1994, which necessitated the despatch of impugned property. Therefore, there was no 'source' from which the 1st accused could derive the implied authority to requisition goods. He nevertheless held out to the warehousekeeper that he did so properly possessing the implied authority to do so.

The warehousekeeper actng in good faith in accordance with the implied authority vested in him by the complainant despatched the goods according to the wishes of the 1st accused believing the latter to be duly authorised to requisition the impugned property. The impugned property was received by Wijeratne on the instructions of the 1st accused.

The warehousekeeper by virtue of his office was a servant of the complainant and therefore had only the custody and not possession in respect of the goods entrusted to him. Since the 1st accused had by his act of requesting the impugned property from the warehousekeeper held out to the latter that he was acting with due authority, the warehousekeeper proceeded to despatch the same on the premise that he had the implied consent of the complainant so to do.

Inasmuch as the transfer of the impugned property was executed with the consent and co-operation of the warehousekeeper, though wrongfully procured, the said transfer is a 'delivery' as opposed to a 'taking'.

The person who took receipt of the impugned property, namely, witness Wijeratne (3rd accused) too was by virtue of his employment, answerable to the complainant, his acquisition of the impugned property can in no way amount to an acquisition of possession, but merely amounts to an acquisition of custody. Accordingly, despite the transfer of the property from one person to another, the complainant, at this juncture still retained possession of the subject property. It must also be observed that the impugned property was loaded onto a lorry which belonged to the complainant's office. In my view, therefore, in the absence of 'a moving out of the possession of the possessor' and 'a dishonest taking' by a recipient as well as the presence of the implied consent of the possessor, the aforesaid '1st movement' of the subject property cannot amount to a theft. According to the evidence, it was on the instructions of the 1st accused that the impugned property was moved, by a team headed by the 3rd accused from Kandy to Colombo on the 7th of May, 1994, in the same lorry belonging to the Sri Lanka Telecom – Central Province used for the purpose of transporting the said property from Wattegama to Kandy.

Inasmuch as the 3rd accused and his party, by virtue of their employment were all answerable to the complainant and therefore could only claim custody of the impugned goods, and by virtue of the fact that they were acting under the instructions of the 1st accused who had held himself out to have been authorised by the complainant, this '2nd movement' of the impugned property too like the '1st movement' referred to above does not suffice to constitute a theft. This is clearly illustrated in illustration 'N' to section 366 of the Penal Code. " 'A' asks charity from 'Z' 's wife. She gives 'A' money, food and clothing, which 'A' knows to belong to 'Z', her husband. Here it is probable that 'A' may conceive that 'Z' 's wife is authorised to give away alms. If this was 'A' 's impression, 'A' has not committed theft."

The evidence discloses that when the impugned property reached Colombo, it was transferred from the 3rd accused's custody to the 2nd accused on the instructions of the 1st accused.

As has been observed earlier, the 3rd accused and his party by virtue of their employment were answerable to the complainant. Accordingly, they merely had custody in respect of the subject property. Furthermore, since they were acting solely on the instructions of the 1st accused, who held himself out to have been authorised by the complainant to do so, they, in good faith believed themselves to have had the implied consent of the complainant to deliver the custody (as opposed to possession) of the impugned property to the 2nd accused.

The 2nd accused (the present appellant) however though an employee of the Sri Lanka Telecom, was not be virtue of his employment answerable to the complainant, nor to the 1st accused. Therefore, he could not, at any time be considered a clerk, agent or servant of the complainant or the 1st accused. Therefore, when the impugned property was transferred from the 3rd accused to the 2nd accused, the 2nd accused was not obliged to recognize the superior right of the complainant, and accordingly acquired possession of the impugned property as opposed to mere custody.

In so acquiring the possession of the impugned property, the 2nd accused had done so without the consent of the former possessor, namely, the complainant.

Further, according to the evidence, the impugned property was loaded onto a private vehicle which had been procured for this purpose by the 2nd accused on the instructions of the 1st accused.

The '3rd movement' could not have been effected without the participation of both the 1st and 2nd accused. *While the 1st accused, by his display of apparent authority caused the subject property to be released from the possession of the complainant, the 2nd accused by his act of procuring the same, acquired possession anew on behalf of both himself and the 1st accused.* The said '3rd movement' resulted in the impugned property being moved out of the possession of the possessor, namely, the complainant without his express or implied consent. Therefore, in my view the *actus reus* of the offence of theft was properly constituted by this '3rd movement'.

Having regard to the facts stated above, I am unable to agree with the submission that there was no participation by the appellant in the alleged offence of theft.

The third matter on which leave to appeal has been granted is on the question whether the learned Magistrate misdirected himself when he observed that the dock statement of the appellant had no evidentiary value. I have examined the judgment of the learned Magistrate and find that the Magistrate has indeed stated that the dock statement made by the appellant had no evidentiary value. On this matter the learned Magistrate has clearly misdirected himself. It is indeed well settled law that when an unsworn statement is made by an accused from the dock, that such statement must be looked upon as evidence subject however to the infirmity that the accused had deliberately refrained from giving sworn testimony. Though there is no statutory provision for it, the right of an accused to make an unsworn statement from the dock has been recognized by our Courts for many years. (See The *King v. Sittamparam*[1]) and is now part of the established procedure in our Criminal Courts. If such statement is believed, it must be acted upon, if it raises a reasonable doubt in their minds about the case for the prosecution, the defence must succeed. However, it should not be used against another accused. (Vide *The Queen v. Kularatne*[2]). In the instant case, the learned Magistrate had admittedly given no consideration whatsoever to the unsworn statement made by the appellant from the dock and has specifically stated that such statement had no evidentiary value. In *The Queen v. Mapitigama Buddharakhita Thera and two others*[3], the Court of Criminal Appeal has observed that the right of an accused person to make an unsworn statement from the dock is recognized in our law. That right would be of no value, unless such a statement is treated as evidence on behalf of the accused, subject however to the infirmity it attaches to statements that are unsworn and have not been tested by cross-examination.

I am in respectful agreement with this view and I am of the opinion that such a statement must be looked upon as evidence subject to the infirmity that the accused had deliberately refrained from giving sworn testimony.

Having regard to the evidence adduced in this case, I am of the view that there was sufficient evidence before the Magistrate upon which the appellant might reasonably have been convicted, but for the erroneous view taken by the Magistrate that an unsworn statement from the dock made by an accused person has no evidentiary value. The conduct of the Magistrate in disregarding altogether the unsworn statement made by the accused from the dock, in my view, has caused

prejudice to the appellant. I therefore hold that the learned High Court Jùdge has rightly ordered a retrial in this case. In the circumstances, I affirm the judgment of the learned High Court Judge directing a trial *de novo* in this case before a different Magistrate. The appeal is, accordingly, dismissed.

ANANDACOOMARASWAMY, J. – I agree.

BANDARANAYAKE, J. – I agree.

Appeal dismissed.