1935 [IN REVISION.]

Present : **Soertsz A.J.**

NAIR *v.* VELUPILLAI.

P. C. Jaffna, 7,752.

Loitering on public road—Elements of offence—Burden on prosecution—Meaning of word "loiter"—Penal Code, s. 451.

In a charge under section 451 of the Penal Code the burden is on the prosecution to prove (1) that the accused was a thief or was reputed a thief, (2) that he was loitering about a public place, (3) that his intention was to commit theft or other unlawful act.

The meaning of the word "loiter" explained.

CASE referred by the Police Magistrate of Jaffna for consideration by the Supreme Court.

July 11, 1935. SOERTSZ A.J.—

The question reserved by the Police Magistrate of Jaffna for consideration by this Court is whether the conviction entered by him in this case is justified when the principle underlying section 451 of the Penal Code is applied to the facts relied upon by the prosecution.

The accused man was charged in that being " a reputed thief " he was " found loitering about on the public road with intent to commit theft or other unlawful act ". To establish such a charge the prosecution must prove (1) that the accused was a thief or was reputed a thief, (2) that he was *loitering* about any public place, (3) that his intention was to commit theft or other unlawful act. The burden on all these points is on the prosecution. The evidence clearly establishes point (1). With regard to point (2), I do not think that the evidence shows that the accused was 'loitering'. The word 'loiter' is defined in the Concise Oxford Dictionary as meaning " *to linger on the way, hang about ; travel indolently and with frequent pauses* ". The evidence in the case bearing on this point is (*a*) *that of Police Sergeant 1889 Nair,* who says, " I saw the accused loitering about on the public road near the market ". When the Sergeant used the word loiter in that way he begged the whole question involved. He should have spoken in detail as to the manner of the accused man's movements and left it to the Court to decide whether those movements amounted to 'loitering'. However, when Nair was recalled on the next trial date and cross-examined he elucidated this matter of loitering and said, " Accused . . . . was *going along* the road coming out of the market. I saw him getting on to road from the market. *He was walking* ". In my opinion, the movements described here cannot be brought under the definition of " loitering ". (*b*) That of *Police Constable 1719 Weerabangsa.* He says " as we were coming along, I saw accused *getting out of the market premises on to the road . . . . When I first saw him he was on the road . . . . Accused went from Grand Bazaar towards Hospital road* ". This does not advance the case for the prosecution on this point. In my opinion, the prosecution failed on point (2) and the accused was entitled to be discharged on that ground alone. But, I should wish to consider how the case stands on point (3) as well. It was for the prosecution to prove that the accused man's intention was to commit theft or other unlawful act. As the learned Magistrate rightly observes " This intention has to be presumed from circumstances ". The intention to commit theft or other unlawful act must emerge clearly from the circumstances relied upon. The Magistrate says, " Accused was arrested in a public place at an unusual hour and near the market where goods are kept in unsafe buildings. I am justified in presuming from those circumstances that he was found in a public place with intent to commit an unlawful act. *It was up to the accused to explain his presence satisfactorily. This he has failed to do* ". Here the learned Magistrate has misdirected himself by confusing the section of the Penal Code under which the accused was charged, viz., section 451 with the preceding section which provides : " Whoever is found in or upon any building or enclosure for any unlawful purpose or whoever is found in or upon any building or enclosure *and fails to give a satisfactory account of himself,* shall be punished, &c. That section expressly throws the burden on the accused to account for his presence. Section 451 throws no such burden on him. Therefore, it was wrong to take the absence of an explanation by the accused, as one of the circumstances from which his ' intention ' might be inferred. The other circumstances referred to are, in my opinion, not suffi-

cient for drawing the necessary inference. The prosecution failed on point (3) as well. I wish, however, to carry the matter a little further in order to say that if a *prima facie* case had been made out against the accused—and in my opinion it was not—and the occasion thus arose for the accused to enter upon his defence, there is evidence given by the accused sufficient to raise a reasonable doubt with regard to the charge against him and to entitle him to claim an acquittal on that ground, for the burden is on the prosecution right to the end of the case and before it succeeds it must eliminate all reasonable doubts. The accused, upon being charged, said, "On the very same day there was a case against me and I was discharged. I was arrested when I was returning from the bioscope". He gave evidence to the same effect. That was his explanation. On the face of it, it is a reasonable explanation and it was incumbent on the prosecution to show that that explanation was false.

At best, the case against the accused is a case of suspicion. I, therefore, think that the conviction is wrong and should be set aside.

Set aside.