1935 *Present :* **Koch J.**

FERNANDO *v.* WILLIAM SINGHO

381—P. C. Matale, 12,807.

Appeal from acquittal—Interference only in exceptional cases—Retaining stolen property—Reasonable explanation—Penal Code, s. 394.

An appeal on the facts from an acquittal should not be allowed unless it is established that the Magistrate has acted under a misapprehension of the effect of the evidence or unless there is some fact, not dependent on the credibility of witnesses, which shows that his finding is incorrect.

Where, in a charge of receiving stolen property, the explanation of the accused taken as a whole is reasonable, the fact that there are one or two statements that may not be strictly true will not prevent the explanation from prevailing, unless the prosecution satisfies the Court that the explanation *qua*-explanation is false.

APPEAL from an acquittal by the Police Magistrate of Matale.

Kariapper, Acting C.C., for Crown, appellant.

R. C. Fonseka, for accused, respondent.

August 1, 1935. Koch J.—

This is an appeal by the complainant, P. C. 2303 M. R. C. Fernando, with the sanction of the Solicitor-General. The respondent, who was the second bungalow servant of Mr. H. J. D. Stokes, was charged with having on or about October 16, 1934, committed theft of a white bed sheet, a white pillowcase, seven curtains, one silk handkerchief, one pair silk stockings, and half a packet (1 lb.) of tea, all valued at Rs. 15, the property of Mr. Stokes, under section 370 of the Penal Code. He was also charged under section 394 with receiving or retaining these articles knowing or having reason to believe the same to be stolen.

The learned Magistrate considered the case to be one only of strong suspicion, and as he had doubts as to the guilt of the respondent, he gave the accused the benefit of those doubts and acquitted him.

The appeal is on the law and the facts. So far as the facts are concerned, it has been held in the cases of *The Solicitor-General v. Fernando* [1] and *The King v. Kumarasamy* [2] that an appeal on the facts from an acquittal should not succeed unless it has been established that the Magistrate has acted under a misapprehension of the effect of the evidence or unless there is some fact, not dependent on the credibility of the witnesses, that shows that his finding of the facts is incorrect, and that this Court should only interfere in very exceptional cases when it is perfectly clear to this tribunal that the finding of the inferior Court is erroneous.

The facts, as found by the learned Magistrate, are that the silk stockings and silk handkerchief (P1), some pieces of curtains (P2), and a pillowcase (P3) were found in a trunk in a room in the Assistant Superintendent's bungalow, which at the time was used as servants' quarters. There

[1] *1 C. W. R. 207.* [2] *3 C. W. R. 184.*

were four rooms in this bungalow and one of them was occupied by the respondent and his wife, the rest being occupied by others. He also found that in an unlocked drawer of a chest in the same room were discovered the white bed sheet (P4) and the half packet of tea. He further found that these articles were rightly identified by Mrs. Stokes as belonging to her. It does not transpire either in the evidence or in the judgment when these articles were missed by the owner. It is possible therefore that the possession was not recent. It is for the prosecution to establish recent possession on the part of the respondent before the presumption of theft can apply. Assuming that the possession was recent, a burden lay on the respondent to explain his possession.

In the trunk were also found women's clothes, and this trunk was opened by the Police in Mr. Stokes' presence with a key that was handed to the Police by the respondent's wife. In a cupboard in this room among a number of knickknacks was found the half pound of tea and in the unlocked drawer of a chest of drawers the sheet was discovered among the accused's clothes and a child's clothes.

Much was made of the point by the appellant's counsel that the respondent in his evidence in chief said " I deny that the articles produced were found in my possession ". He argued therefrom that this denial which was false tinged the respondent's explanation and that therefore the explanation was not acceptable, although the Magistrate did in point of fact accept it. It is clear that the respondent in making this statement did not intend to deny that the articles were physically discovered in his room but that he intended not to admit that they could be said to be in his actual possession as different from his wife's or that they were in his exclusive possession.

This is an instance of unhappy recording, for a reference to the charge sheet will show that when the accused was asked to plead he stated " I am not guilty. These articles were lying in the drawer of my room ". Then follows a brief explanation. This was before the trial.

There is a point, however, where his evidence clashes with the Magistrate's finding, and that is that P 1 and P 3 were found in the drawer. The Magistrate is of opinion that these articles were found in the trunk, but this does not materially matter as P 1 and P 3 being in the trunk were more favourable to the respondent as the trunk contained his wife's clothes and the key was with his wife.

There is also the fact found by the Magistrate that some of the pieces of curtains (P 2) were fixed on a screen which separated one room from another and that these were openly hung up—to use the Magistrate's own words.

The learned Magistrate took these circumstances into consideration as well as the fact that the articles in question were either of female apparel or intended for the use of women, and also that there was enmity between another servant, the driver, and the respondent over the former's intimacy with the respondent's sister-in-law, and came to the conclusion that it was quite possible that these articles may have come into the hands of the respondent's wife from hands other than the accused's. The facts that the respondent's clothes were also in the drawer did not escape the Magistrate.

In *Rex v. Bailey* [1] a direction to the jury that when it came to the accused's turn to explain the possession they had to be satisfied that the explanation was true was held to be a misdirection to the jury on the law.

In *Rex v. Ambramovitch* [2] Lord Reading C.J. laid down as law that if the jury thought that the explanation given was reasonably true, although not convinced that it was true, the prisoner was entitled to be acquitted.

The decisions in these cases met with the approval of Anton Bertram C.J. in *Perera v. Marthelis Appu* [3].

The same point, however, came up for consideration before a Divisional Bench in the case of *The Attorney-General v. Rawther* [4]. Sir Anton Bertram there was of opinion that the words used by Lord Reading really meant that the explanation should be reasonable. This view was adopted by Akbar J. in *King v. Thomas Appu* [5].

In this state of the law my opinion is that if the explanation of the accused taken as a whole is reasonable, the fact that in the course of that explanation there may happen to be one or two statements that may not be strictly true will not prevent the explanation from prevailing, unless the prosecution satisfies the Court that the explanation *qua*-explanation is false.

It may relevantly be noted that in the Divisional Bench ruling Ennis J. stressed the importance of the possession being recent. He observed that the presumption of guilt arising from recent possession gets weaker as time goes by till the point is reached when no presumption can be drawn. If the article, he declared, be a common thing passing from hand to hand in the every day business of human life, this point would soon be reached.

The articles in the case before me are common things and it is not clear when they were stolen. So far as the curtains are concerned, Mr. Stokes' evidence is that they were in the bungalow till about June, 1934, while the date of the theft given in the charge is October 16, 1934, *i.e.*, four months after. There is no corresponding evidence regarding the other articles. He also refers to a letter he wrote to the Police on October 19, 1934. What this letter contained we do not know. It is possible that he generally stated there that articles were missing from time to time from the bungalow, but in the absence of specific evidence that the articles in question were stolen very recently, I have to hold that it has not been proved when these articles were stolen. I cannot therefore regard these as recent thefts.

The Magistrate has accepted the explanation of the accused as reasonable in the circumstances and given the respondent the benefit of the doubt. He was also of opinion that the possession of the respondent was not actual or exclusive. I am not prepared to say that the learned Magistrate is wrong and I therefore dismiss the appeal.

Appeal dismissed.

[1] (1917) *W. N. 323.*
[2] (1914) *84 L. J. K. B. 397.*
[3] *21 N. L. R. 312.*
[4] *25 N. L. R. 385.*
[5] *30 N. L. R. 431.*