Present : Bertram C.J.

1921.

THE KING *v.* ARNOLIS.

139—D. C. Colombo, 5,928.

Theft — Accused charged with dishonest retention of stolen property — Evidence of previous sales of stolen timber by accused—Criminal Procedure Code, ss. 182 and 408—Penal Code, s. 394.

Accused, who had agreed with a timber merchant to sell him a certain quantity of timber, went with another person and opened a timber store belonging to Messrs. Darley, Butler & Co., and loaded carts with timber. He was promptly arrested at the stores in the act, and was charged with dishonest retention of stolen property under section 394 of the Penal Code.

Evidence was led at the trial to prove that he had sold timber belonging to Messrs. Darley, Butler & Co. to others on previous occasions.

Held, that while the charge of dishonest retention was not appropriate to the circumstances, it was open to the Court to convict the accused of theft under section 182 of the Criminal Procedure Code.

The evidence of previous sales of stolen timber was admissible on the question of theft. "This evidence was tendered under section 408 of the Criminal Procedure Code in support of the charge of retaining stolen property. It was, no doubt, because he wished to utilize this evidence under that section that counsel for the Crown declined to amend the indictment. But this section ought not to be made use of in this indirect manner. If the circumstances do not really indicate the offence of retention of stolen property, the section does not apply at all. On the other hand, this evidence was admissible on the question of theft altogether independently of that section. It was relevant as evidence of a systematic course of dealing by the accused inconsistent with the possible defence on the part of the accused, namely, that he had innocently fetched the carts, or that he had on this occasion innocently lent himself to the scheme of the real thief."

APPEAL from an acquittal.

Jansz, C.C., for the appellant.—To constitute the offence of dishonest retention of stolen property there need not be a change in the mental element of possession from an honest to a dishonest condition of mind. The latest Ceylon rulings differ from the Indian rulings which the District Judge has followed (see *1 C. W. R. 230*).

Soertsz, for the accused, respondent.—There are many Ceylon decisions in favour of the District Judge's view. (*3 N. L. R. 267; 2 N. L. R. 4;* P. C. Anuradhapura, 18,943[1]; P. C. Trincomalee, 5,945[2]; and P. C. Panadure, 12,860.[3]) The facts disclose an offence

[1] *S. C. Min., Jan. 17, 1898.* [2] *S. C. Min., Jan. 24, 1898.*
[3] *S. C. Min., Aug. 7, 1902.*

1921.

The King v. Arnolis

of theft if any offence was committed, and not the offence of dishonest retention. It is not proper to charge under section 394 with the object of leading evidence of previous dealings with stolen goods.

The facts relied on by the prosecution to prove theft are not inconsistent with the innocence of the accused.

October 18, 1921. BERTRAM C.J.—

This an appeal by the Solicitor-General against an acquittal. The accused was charged "that on or about March 30, 1921, he did dishonestly retain 420 teak planks, the property of Messrs. Darley, Butler & Co., Limited, knowing them to be stolen property."

The evidence discloses that the accused took part in what was a very imprudent theft. On March 29, 1921, he came to one Cornelis Perera, a timber merchant, and offered a quantity of teak planks for sale. Knowing that timber had been missed from Messrs. Darley, Butler's stores, Cornelis Perera suspected him, and communicated with Messrs. Darley, Butler's manager, Mr. Foucar, who requested Cornelis Perera to get the timber brought to his store. On March 30 the accused, with a man who appeared to be a clerk, went to Messrs. Darley, Butler's store, which his companion opened with a key. Three carters engaged by the accused were in attendance, and saw the store opened. Accused ordered the carts to be loaded. Two went off to Cornelis Perera's, but before the third cart had departed, Mr. Foucar, Messrs. Darley, Butler's manager, arrived; the cart was detained, and the accused was taken to the police station. He explained to Mr. Foucar that he had been merely asked to fetch the carts, but did not say who asked him to do so. The stores were not at the time in charge of a storekeeper, but there was a watcher on the premises. Both on March 28 and 30 this man saw the accused and the supposed clerk come to the stores and open them. The clerk told the watcher that the accused was a kangany of Messrs. Darley, Butler's, and the accused did not deny it.

In addition to this evidence, three other timber merchants were called, who proved that on February 24, March 2 and 8, and March 25 and 28, accused came to them and sold them timber with marks from which it can be identified as Messrs. Darley, Butler's timber, producing memoranda with the name of Messrs. Darley, Butler's firm printed upon them, purporting to indicate that the timber sold had been supplied to the accused by Messrs. Darley, Butler. Forged signatures of an assistant storekeeper of Messrs. Darley, Butler's were upon these documents.

The learned District Judge very truly observed in the course of the evidence that if the evidence disclosed an offence it was the offence of theft and not that of retaining stolen property, and he invited counsel for the Crown to amend the indictment. Counsel for the Crown did not accept this invitation. In giving judgment the

learned Judge took a view of section 394 of the Penal Code (retaining stolen property), which, though adopted in India, has been discarded by this Court. This view is expressed by an Indian commentator as follows: "Neither the thief nor the receiver of stolen property commits the offence of retaining stolen property dishonestly, merely by continuing to keep possession of it. To constitute dishonest retention there must be a change in the mental element of possession from an honest to a dishonest condition of mind in relation of the thing possessed." It is sufficient to say that we do not adopt this view of the section (see the judgment of Shaw J. in *Brantha v. Kaliamuttu* [1]).

The learned District Judge was perfectly right in saying that the evidence disclosed theft or nothing. It was open to him, however, under section 182 of the Criminal Procedure Code, to convict the accused of theft, if he thought that the circumstances of the case justified it. He came to the conclusion that they did not, and for this reason. The accused said that he was under the impression that the person who accompanied him to the stores was the storekeeper, and that the storekeeper had authority to sell the timber, and that he accordingly assisted the storekeeper in return for a commission. The learned Judge thinks that "the circumstances of the case do not show that this cannot be a true account." I regret that I cannot share the charitable view of the learned Judge. The accused when first arrested put forward the excuse that he had merely fetched the carts. He allowed it to be said in his presence that he was a kangany of Messrs. Darley, Butler's. Quite apart from this, I find it impossible to believe that a person of the accused's status could honestly think that a person purporting to be a storekeeper of Messrs. Darley, Butler's had authority to take timber from the stores and sell it on commission.

I would also point out that this is not a case of a presumption to be drawn from recent possession of stolen property. The accused was actually found removing the property in co-operation with an admitted thief. It is for him to give a reasonable account of how he came to be engaged in this transaction, and he cannot be said to have done this.

It is necessary that I should say something as to the evidence of the three timber merchants above referred to. This evidence was tendered under section 408 of the Criminal Procedure Code in support of the charge of retaining stolen property. It was no doubt because he wished to utilize this evidence under that section that counsel for the Crown declined to amend the indictment. But this section ought not to be made use of in this indirect manner. If the circumstances do not really indicate the offence of retention of stolen property, the section does not apply at all. On the other hand, this evidence was admissible on the question of theft altogether

[1] *(1915) 1 C. W. R. 230.*

1921.

BERTRAM C.J.

The King v. Arnolis

independently of that section. It was relevant as evidence of a systematic course of dealing by the accused inconsistent with a possible defence on the part of the accused, namely, that he had innocently fetched the carts, or that he had on this occasion innocently lent himself to the scheme of the real thief. (See *Makin v. Attorney-General for New South Wales.*[1])

The learned Judge, with reference to this evidence, says that he is not affected by it because the timber disposed of to these merchants may possibly have been timber, with the same marks, which was sold by Messrs. Darley, Butler to other parties several months before. The learned Judge has apparently overlooked the fact that the accused accompanied the delivery of this timber with forged memoranda purporting to be issued by Messrs. Darley, Butler at the time. I think that it is perfectly clear from all the circumstances of the case that the accused was an accomplice in the theft.

I set aside the acquittal of the accused and convict him of theft in pursuance of section 182 of the Code, and sentence him to one year's rigorous imprisonment.

Set aside.