Present : Mr. Justice Wood Renton.

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HODGSON *v.* GEORGE.

P. C., Badulla, 3,139.

Receiving stolen property—Recent possession, what is—Circumstances—Confession—Inducement—Bias—Police Magistrate trying a case summarily as District Judge—Penal Code, s. 394—Criminal Procedure Code, s. 152 (3)— Evidence Ordinance, ss. 17 and 114 (a).

Where a person is found in possession of stolen property, the question whether his possession is "recent," or, in the words of section 114 (*a*) of the Evidence Ordinance, "so soon after" the theft as to give rise to the presumption of theft or dishonest receipt, depends largely on the nature of the property stolen, the facility with which it would pass from hand to hand, and the likelihood of its possessor for the moment forgetting how he had come by it.

Where the accused was found in possession in or about January, 1909, of a typewriter of a special class, bearing a particular number, and worth Rs. 300, stolen in December, 1907,—

Held, that the accused's possession was "so soon after" the theft, within the meaning of section 114 (*a*) of the Evidence Ordinance, as to give rise to the presumption of theft or dishonest receipt.

Where a confession was induced by the following words addressed to the accused by his master: "I know the typewriter is in your bungalow. You had far better tell the truth, and if you do, nothing will happen to you,"—

Held, that the confession was inadmissible.

WOOD RENTON J. (*obiter*, and expressly reserving the right to consider the point afresh).—An advocate cannot bind his client in a criminal case by the admission of any material part of the case for the prosecution.

THE accused was charged with an offence under section 394 of the Penal Code, in that he dishonestly received and retained possession of a typewriter belonging to Mr. G. C. S. Hodgson, knowing or having reason to believe the same to be stolen. The Police Magistrate (C. V. Brayne, Esq.), who was also District Judge, tried the case summarily as District Judge under section 152 (3) of the Criminal Procedure Code, and convicted him and sentenced him to one year's rigorous imprisonment.

The accused appealed. The facts and arguments are fully stated in the judgment.

E. W. Jayewardene, for the accused, appellant.

C. B. Elliott, for the complainant, respondent.

Cur. adv. vult.

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This case raises interesting, important, and somewhat difficult points of law, which have been well argued on both sides. The accused-appellant was charged under section 394 of the Penal Code, originally in the Police Court of Bandarawela, with dishonestly receiving and retaining possession of a typewriter belonging to Mr. G. C. S. Hodgson, manager of the Ceylon Planters' Transport Company, Bandarawela. The charge was duly explained to the accused, who was represented by a proctor; and his statutory declaration was then made and recorded. The learned Police Magistrate regarded it as an admission of guilt; and at an adjourned hearing of the case he made the following journal entry:—" Accused has not been convicted before this. Considering this and all the facts of the case, it appears to be one which I can conveniently deal with under section 152 (3) of the Criminal Procedure Code as District Judge."

The appellant's proctor did not challenge the Magistrate's finding that his client's statement was, in effect, an admission of guilt. He contented himself with pointing out that the Magistrate could not sit as District Judge at Bandarawela; and accordingly the proceedings were postponed for trial in the District Court of Badulla. When the case came on for hearing there, the appellant's proctors objected to the Police Magistrate of Bandarawela trying it in his capacity of District Judge of Badulla, on the grounds that he was already prejudiced against the appellant, and that there was in Badulla an Additional District Judge, the Assistant Government Agent, before whom it might be tried. The Magistrate, whom I will henceforward describe as the District Judge, over-ruled these objections, and the trial proceeded. The appellant was convicted and sentenced to one year's rigorous imprisonment. From that conviction and sentence the present appeal has been brought. On behalf of the appellant, Mr. Jayewardene raised a variety of points.

He contended (1) that as there is an Additional District Judge at Badulla, the learned District Judge there ought, in his discretion, to have sent the case for trial before his colleague; (2) that both from the fact that he had conducted the original summary proceedings, in which a Police Magistrate always possesses more or less of the character of a prosecutor, and from his attitude towards the appellant as disclosed by the record, the learned District Judge was under the influence of a " bias," which disqualified him from trying the case; (3) that the case was one of unusual difficulty, unsuited for summary trial in the District Court; (4) that the only real evidence against the appellant consisted of admissions, which were vitiated by the fact that they had been made under the influence of an illegal inducement; and (5) that the interval of time between the theft of the typewriter and its discovery in the possession of the appellant was so great as to exclude the adverse inference which

section 114 (*a*) of the Evidence Ordinance permits the Court to draw from the recent possession by an accused person of stolen property. I will deal with these arguments in turn.

I think that under the circumstances stated by the learned District Judge he was entitled to try this case himself. The case, as I have already said, came before him, in the first instance, at Bandarawela, and he there intimated his intention of trying it as District Judge. The only objection raised by the appellant's proctor to the adoption of this course was that the case would have to be so tried at Badulla. The Judge thereupon summoned the witnesses, and made all the necessary arrangements for the trial. He further points out that the Additional District Judge of Badulla is also Assistant Government Agent, and that his other official duties fully occupy his time, and render it inadvisable that cases should be sent before him as District Judge where this can be reasonably avoided. As Bonser C.J. himself points out in *Vengadasulam v. Mohideen Pitchchi*,[1] there is nothing in section 152 (3) of the Criminal Procedure Code which requires a Magistrate who thinks that a case may properly be tried summarily in the District Court to decline to try it himself if another District Judge is available (*Pieris v. Wijetunge*[2]).

The District Judge's official connection with the present case in its earlier stages does not, in my opinion, in any way disqualify him from trying it. To adopt the contrary view would be to defeat the object of section 152 (3) of the Criminal Procedure Code, which not only lends no colour to the argument that the fact of the Police Magistrate having been engaged in the trial of a case as such is to prevent him from trying it as District Judge, but expressly enables him to do so. The cases, both local (*Rode v. Bawa*;[3] *Daniel v. Careem Usoof*;[4] *Perera v. Carolis*[5]) and Indian (*Girish Chunder Ghose v. Queen Empress*;[6] *Sudhama Upadhya v. Queen Empress*[7]), to which Mr. Jayewardene referred me in support of his argument on this point, are cases of quite a different character, the *ratio decidendi* there being that the Magistrate exercised also other functions, *e.g.*, those of Revenue Officer or Superintendent of Police, in regard to the very class of proceedings that he had to try as Judge. The only evidence of alleged actual " bias " on which Mr. Jayewardene relied consisted in the statement of the District Judge that an admission made by the accused in his statutory declaration amounted to a free confession of guilt. Mr. Jayewardene requested me not to look at this admission in view of facts which I will notice later on; and I have not done so. I find, however, that the District Judge in his judgment very fairly excludes the appellant's alleged

[1] (*1900*) *1 Browne 335.*
[2] (*1907*) *4 Bal. 85.*
[3] (*1896*) *1 N. L. R. 373.*
[4] (*1899*) *1 Tamb. 60.*
[5] (*1898*) *1 Tamb. 61.*
[6] (*1893*) *I. L. R. 20 Cal. 857.*
[7] (*1895*) *I. L. R. 23 Cal. 328.*

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confession from consideration in deciding on the question of his guilt. I see no evidence of any actual "bias" in his mind against the appellant. On the contrary, I think he has done everything in his power to secure a perfectly fair trial.

There is no doubt as to the general principle that where a case presents unusual difficulty, in regard either to the facts or to the law, it is not desirable that the powers conferred on Police Magistrates by section 152 (3) of the Criminal Procedure Code should be exercised (see *Sinnatamby v. Mendis Appu*;[1] *Vengadasulam Chetty v. Mohideen Pitchchi*;[2] *Silva v. Silva*[3]).

In the present case Mr. Jayewardene may fairly rely on three points as bringing the appellant within the scope of this rule: (*a*) the fact that it was only after the Police Magistrate had taken the accused's statutory declaration that he decided to try the case as District Judge (see *Reg. v. Uduman*,[4] *Punchirala v. Don Cornelis*[5]); (*b*) the fact that the case against the appellant may be said to have largely depended on the question of the admissibility of an admission by his proctor, to which reference is made in the judgment, and with which I will deal presently; and (*c*) the question whether the interval of time between the theft and the discovery of the typewriter with the appellant was of too long duration to satisfy the law as to recent possession. I agree with Mr. Jayewardene to this extent that, if a clear *primâ facie* case against the appellant has not been made out, irrespective of his alleged confession or his proctor's admission, or if the law as to recent possession has not been satisfied, there ought to be an acquittal. I will revert to this subject when I have dealt with the other aspects of the case.

The first witness to come in contact with the appellant, after he was suspected of being in possession of the stolen typewriter, was Mr. Grant, the Superintendent of Nayabedde estate, where the appellant was employed as a teamaker. Two portions of Mr. Grant's evidence have a special bearing on the point that I am now considering, and I will cite them in full:—

(1) "I asked him if he had a typewriter in his bungalow. I think he said he had his brother-in-law's typewriter, or else he did not admit it. I cannot be sure which.

(2) "Then I said to him: 'I know the typewriter is in your bungalow. You had far better tell the truth, and if you do, nothing will happen to you.'"

So exhorted and encouraged, the appellant proceeded to account for his possession of the typewriter in terms which constituted an "admission" within the meaning of section 17 of the Evidence Ordinance.

[1] (*1899*) *1 Tamb. 39.*
[2] (*1900*) *1 Browne 335.*
[3] (*1904*) *7 N. L. R. 182.*
[4] (*1900*) *4 N. L. R. 1.*
[5] (*1904*) *8 N. L. R. 158.*

I agree with the learned District Judge that the inducement under which that admission was made excludes the entire body of statements made by the appellant to Mr. Grant, and subsequently to Mr. Hodgson, in regard to the circumstances under which the typewriter came into his possession. Moreover, as the learned District Judge has, with great fairness, expressed the opinion that Mr. Grant's inducement may still have been operating on the mind of the appellant when he made his statutory declaration. I have not myself looked at it in considering the evidence in the case.

I pass now to the admission made by the appellant's proctor. Unfortunately no note of it has been entered in the record. But the District Judge has dealt with the matter explicitly in his judgment, and neither in the petition of appeal nor in the argument before me, has it been suggested that he had misapprehended the proctor's meaning.

It appears, then, that the appellant's proctor stated, in opening his defence, that he was perfectly ready to admit that the accused bought the typewriter from two Sinhalese villagers, who were charged in a connected case, and of whom the Judge somewhat imprudently expresses the opinion that " their faces are villainous," and that " they have all the appearance of criminals." If it were necessary to decide the question whether it is competent for a proctor to make such an admission as the one relied on by the District Judge here, I should feel bound to refer the case to a Bench of two Judges. On the one hand, the passages in the Earl of Halsbury's *Laws of England* (*Vol. II., 409*) and Roscoe's *Evidence* (*edition of 1908, pp. 185, 186*), to which Mr. Jayewardene referred, and in which the rule is laid down that an advocate has no right, in addressing the Court or Jury in a criminal case, to mention facts on the prisoner's instructions which he does not intend to prove by calling evidence (and *cf. Reg. v. Beard* [1]), do not seemt o bear on the right of an advocate to bind his client by admissions. On the other hand, I am not satisfied that section 58 of the Evidence Ordinance, assuming it to apply to criminal proceedings, goes further than to enable formal proof of some part of the case for the prosecution, *e.g.*, the death of a witness whose deposition it is desired to read in evidence (*Reg. v. Gogalao* [2]), to be dispensed with by agreement between the advocates or proctors on both sides. In England even such admissions are regarded with some jealousy by the Courts (see *Reg. v. Thornhill* [3]), and I have always understood the rule to be that an advocate cannot bind his client in a criminal case by the admission at least of any material part of the case for the prosecution, and I have so applied it myself in the Assize Court. The only express authority cited to me in argument was the decision of Sir Richard Couch C.J. and Ainslie J. in *Reg. v. Kazim Mundle*,[4] that an

[1] (*1837*) *8 C. and P. 142.*
[2] (*1869*) *12 W. R. Crim. 80.*
[3] (*1838*) *8 C. and P. 575.*
[4] (*1872*) *17 W. R. Crim. 49.*

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admission by a prisoner's vakeel cannot be used against him. The report, however, is very brief, and the case may have turned on the question how far a vakeel can bind his client, and not on the general powers of other classes of advocates. But it is unnecessary to decide the issue here, and I reserve the right to consider the whole subject afresh if it should come up for decision at some future time.

It will be convenient, in dealing with Mr. Jayewardene's last point, the alleged absence of proof of recent possession, to consider at the same time how far a *primâ facie* case has been made out against the appellant on the evidence. The theft is clearly proved. Mr. Hodgson says that his office was broken into and the typewriter removed. There is no question as to the identity of the stolen property. It is an Empire typewriter, bearing a special number, 27,112. According to the unanswered evidence of the witnesses for the prosecution, it was found in the "possession" of the appellant. Was that possession "recent," or, in the words of section 114 (*a*) of the Evidence Ordinance, "so soon after" the theft as to give rise to the presumption that the appellant was a dishonest receiver. The facts are that the typewriter was stolen in or about December, 1907. It was found in the appellant's possession in the beginning of July, 1909; and his servant, Abraham Simon, speaks to having seen it in the appellant's house about six months before that date. There was, therefore, an interval of about twelve or thirteen months between the theft of the typewriter and its being in the appellant's possession.

In order to decide the question whether that interval was so long as to exclude section 114 (*a*) of the Evidence Ordinance, we must have regard to the grounds on which the presumption, recognized by that section, rests. It is not an arbitrary rule created by our own local statutory law. It exists under English law and elsewhere. Its application is not confined to theft and dishonest receiving, but extends to other offences as well; *e.g.*, arson (*R. v. Rickman* [1]) and the counterfeiting of money (*R. v. Fuller*;[2] *Reg. v. Jarvis* [3]).

The principle underlying the presumption has been thus defined:—

"As a general proposition, where a person is in possession of property, it is reasonable to suppose that he is able to give an account of how he came by it; and where the property in question has belonged to another, it is in general not unreasonable to call upon him to do so. If the change of possession has been recent, he will not be likely to have forgotten, still less, if it be an article of bulk or value.

"If, then, it be reasonable under such circumstances to call upon the party in possession to account for such possession, it cannot be unreasonable to presume against the lawfulness of that possession when he is unwilling to give an account or is unable

[1] *(1789) 2 East P. C. 1034–35.* [2] *(1816) R. and R. C. C. 308*
[3] *(1855) 25 L. J. M. C. 30.*

to give a probable reason why he cannot. Now, there is no reason in general why an honest person should be unwilling; and, therefore, the law presumes that such person is not honest, and that he is the thief. The property must have been taken by some one. He is in possession, and might have taken it, and he refuses to give such information upon the matter as an honest man ought." (*2 Lew. 235.*)

It is obvious from this bare statement of the *raison d'être* of the rule as to recent possession, and there is abundance of judicial authority to the same effect (see, *e.g.*, *R. v. Partridge*[1] and the local case of *R. v. Fernando*[2]), that what is or is not recent possession must depend largely on the nature of the property stolen, the facility with which it would pass from hand to hand, and the likelihood of its possessor for the moment forgetting how he had come by it. What might be ancient possession in the case of a sack (see *Cockin's Case*[3]), or a workman's tools (*R. v. Adams*[4]), or a sheep (*Reg. v. Harris*[5]), or even of cattle (*Pabilis v. Gunatilleke*;[6] *Wannihamy v. Mudalihamy*[7]), might well be recent possession in the case of a stolen signet ring. This point is well illustrated by an English decision (*Reg. v. Knight*[8]), which I have never yet heard cited in Ceylon. The prisoner Knight was charged at Quarter Sessions with the theft of a riddle and five shovels, the property of his master Richard Hornsby. The riddle was not proved to have been in the prosecutor's possession for eighteen months before the trial, and the shovels for eight months, and the evidence was that Knight was first seen about January, 1863, with the things in his possession, the trial being in June; the articles were, however, clearly identified; there was some evidence of concealment; and the brandmark on some of the shovels had been erased, and the letters "M. K."—Knight's initials—had been substituted. The jury convicted Knight, and the conviction was unanimously affirmed by the Court of Criminal Appeal (Cockburn C.J., Crompton and Willes JJ., Channell B., and Keating J.), the prisoner's own counsel admitting that he could not sustain the objection that had been reserved for the Court. In this case, therefore, a period of twelve months (as regards the riddle) was not considered too long to prevent the prisoner's possession of the stolen property from being "recent." In the earlier case of *Reg. v. Evans*,[9] there was an interval of fifteen months between the disappearance of stolen property—a common beetle-head—and its discovery in the possession of the accused. But the accused, when the article was traced to him, said that he had bought it eight years before at a

[1] (*1836*) *7 C. and P. 551.*
[2] (*1905*) *2 Bal. 46.*
[3] (*1836*) *2 Lew C. C. 235.*
[4] (*1829*) *3 C. and P. 600.*
[5] (*1860*) *8 Cox C. C. 333.*
[6] (*1902*) *3 Browne 138.*
[7] (*1898*) *Ibid.*
[8] (*1864*) *9 Cox C. C. 437.*
[9] (*1847*) *2 Cox C. C. 270.*

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sale of his mother's effects. Alderson B. held that, as the accused denied the identity of the article, while at the same time he admitted he had the beetle-head in his possession at a time immediately after its loss, there was a "recent possession." To a certain extent, of course, this case turns on the point that if the jury decided the question of the identity of the missing beetle-head against the accused, he himself admitted that it had been in his possession immediately after its disappearance. But *Reg. v. Evans* shows also that questions of recent possession require a consideration, not merely of the nature of the missing property, but also of the conduct of the accused when it is found in his possession. In concluding this examination of the cases, I should, perhaps, note that in many of the authorities cited by Mr. Jayewardene the discovery of the stolen property in the accused's possession was practically the only evidence against him (see, *e.g.*, *R. v. Anon*;[1] *Ina Sheikh v. Queen Empress*,[2] where the evidence as to concealment was disbelieved).

In the present case, what are the facts as regards the nature of the stolen property and the conduct of the appellant? The stolen property is a typewriter of a special class, bearing a particular number, and stated by Mr. Hodgson to be worth Rs. 300. An article of that character does not pass readily and rapidly from hand to hand. So much for the nature of the property. How do the facts stand as regards the conduct of the appellant, excluding altogether from the case his admissions to Mr. Grant and Mr. Hodgson; his statutory declaration, and the admission of his proctor? In the first place, we have the evidence of his servant, Abraham Simon, a witness very favourable to the appellant, that he only saw it twice openly exposed to view on a table in the appellant's room, and that for the rest of the time it was not visible, and that he had told the Magistrate in the Police Court proceedings that it had been brought in the night by two men, Appuhámy and Ukku Banda, who were, in fact, brought before the Court in the connected case partly on his information. Mr. Jayewardene urged that it was the duty of the prosecution to have called these men as witnesses (see *Reg. v. Crowhurst*[3]). That duty arises only, however, where a prisoner's account of the circumstances under which he came to possess stolen property is reasonable (*Reg. v. Harmer*[4]), and not where, as here, the persons named by the accused, or his servant, are themselves charged in a connected case (*Reg. v. Wilson*[5]). Moreover—and here I turn again to the evidence—the appellant, when Mr. Grant first spoke to him, and before any inducement was held out which could render the statement inadmissible in evidence, either said that he had got his brother-in-law's typewriter, or denied that he had one at all. It is clear from Mr. Grant's evidence, which

[1] (*1826*) *2 C. and P. 459.*
[2] (*1884*) *I. L. R. 11 Cal. 160.*
[3] (*1844*) *1 Carr. and Kir. 370.*
[4] (*1848*) *2 Cox C. C. 487.*
[5] (*1857*) *Dears. and B. 157.*

I have quoted above, that one or other of those statements was made, for he proceeds: "Then I said to him, 'I know the typewriter is in your bungalow.'"

Taking all these facts together, I hold that the circumstances satisfy the requirements of the law as to recent possession, and that it was incumbent on the appellant to meet the *primâ facie* case established against him. He has not done so. Although the adverse inference which would be drawn from his silence was clearly pointed out by the learned District Judge to the appellant's proctor at the trial, he declined to put his client in the witness box; and in the petition of appeal no explanation of the purchase of the typewriter, which is practically admitted [see paragraph 2 (*c*)], is offered, nor is it suggested that the appellant is in a position to offer one.

The appeal must be dismissed.

Appeal dismissed.