

1925.

Present : Jayewardene A.J.NAMBIAR *v.* FERNANDO.752—*P. C. Kalutara, 9,086.**Evidence—Dishonestly retaining stolen property—Knowledge or belief—Confession.*

In a prosecution for dishonestly retaining stolen property knowledge or belief on the part of the accused that the property was stolen must be proved.

A statement to the police made by the accused, giving an account as to how he came by the property, different to that given in Court, is inadmissible.

A PPEAL from a conviction of the accused of dishonestly retaining a stolen shirt under section 394 of the Penal Code. The Police Magistrate, while accepting the accused's explanation that the shirt was left with him by a customer who had come to take tea at his boutique, as security for money due to him, convicted him on the ground that he must have suspected that the shirt was stolen.

No appearance for accused, appellant.

January 16, 1925. JAYEWARDENE A.J.—

In this case the accused has been convicted of dishonestly retaining a linen shirt, the property of Mr. Proctor Jayasinghe, an offence under section 394 of the Penal Code, and sentenced to pay a fine of Rs. 100. In the petition of appeal objection has been taken to the conviction on two main grounds : first, that there is no evidence that the accused knew or had reason to believe that the article in question was stolen ; and secondly, that the learned Magistrate has wrongly admitted in evidence a statement amounting to a confession in law made by him to a Police Officer. Both these objections are entitled to prevail. The learned Magistrate appears to accept the accused's explanation that the shirt in question was left with him by a customer who had come to take tea at his boutique as security for the amount due to the accused. But he thinks that as the shirt was not completely stitched and unwashed the accused ought to have suspected that it was stolen. He also believes that customers leave articles in this way with the accused or his wife and they are accepted by them without asking any questions as they stand to benefit by so doing. They do not care whether the articles were stolen or not and make no inquiries. Under

section 394, it is necessary for the prosecution to prove that the accused knew or had reason to believe that the property retained by him was stolen. Mere suspicion on the part of the accused is clearly insufficient. Knowledge or belief on his part must be proved. The Court nowhere finds that the accused had the knowledge or belief required by law. The learned Magistrate merely finds that the accused might have suspected that the shirt was stolen, or was indifferent as to whether it was stolen or not. In the absence of a finding that the accused knew or had reason to believe the shirt was stolen, the conviction cannot be sustained.

As regards the second objection, it appears that when the accused was questioned by Police Constable Nambiar as to how he got the shirt, he stated that he got it stitched by a tailor at Beruwala called Sardial Silva. Sardial Silva was questioned and denied having done so. The accused now admits that this statement is false and says he made it through fear. The Proctor for the accused objected to this statement being given in evidence, but the learned Magistrate accepted it under section 27 of the Evidence Ordinance. In his judgment he attaches great importance to this statement. But in my opinion, this statement, which, according to the view prevailing in Ceylon, amounts to a confession, is not admissible under section 27 of the Evidence Ordinance. This section refers to "facts" discovered in consequence of a confession made to a Police Officer and renders them admissible in evidence.

The Magistrate seems to think that in consequence of the confession made by the accused, the fact that Sardial Silva did not stitch the shirt for the accused was discovered, and so the statement became admissible under section 27. I am unable to take this view. "The fact" discovered must, in my opinion, be itself relevant to the case against the accused. Here the fact that Sardial Silva did not stitch the shirt was not relevant to the charge against him, it was only relevant, if at all, to prove that the accused had given a different account when he was first questioned by the police. Such a statement is inadmissible under our law, see *The King v. Kalu Banda*.¹ On this ground too, the conviction is bad.

In the circumstances, I set aside the conviction, and acquit the accused.

Set aside.

¹ (1912) 15 N. L. R. 422.

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JAYEWAR?
DENE A.J.

*Nambiar v.
Fernando*