1947 *Present:* **Howard C.J. and Jayetileke J.**

THE KING *v.* JAYASENA

43-44—D. C. (Criminal) Colombo, 977.

Offences of theft and dishonest receiving—Several accused charged with theft—Possibility of convicting some of theft and some of dishonest receiving—Joinder of accused persons—Joinder of charges—Burden of proof in a prosecution for dishonest receipt of stolen property—Penal Code, ss. 369, 394—Criminal Procedure Code, ss. 181, 182, 184.

Seven accused were charged with committing theft. Three of them were found guilty of theft, and the other four were convicted of dishonestly receiving or retaining the stolen property. The evidence showed that there was, so far as some of the accused were concerned, a measure of doubt as to whether the Court would draw the inference that the facts constituted theft or dishonest receiving of property.

Held, that even if the theft and dishonest receiving were not committed in the same transaction the joinder of all the accused in one charge was in order, and that it was open to the Court, under sections 181 and 182 of the Criminal Procedure Code, to find some of the accused guilty of theft and some of dishonest receiving.

Held, further, that, as the offence of dishonest receiving was in fact committed in the same transaction as the offence of theft, the joinder of such offences was permissible under section 184 of the Criminal Procedure Code.

Where, in a prosecution for dishonest receipt of stolen property, it is established that the accused was in possession of goods recently stolen the burden is on the accused to give an explanation which, in the opinion of the Court, might reasonably be true and which is consistent with innocence.

APPEALS against two convictions from the District Court, Colombo.

E. F. N. Gratiaen, K.C. (with him *G. E. Chitty* and *A. E. Keuneman*), for the 1st accused, appellant.

F. A. Hayley, K.C. (with him *Stanley Alles*), for the 5th accused, appellant.

J. A. P. Cherubim, C.C., for the Attorney-General.

Cur. adv. vult.

June 11, 1947. HOWARD C.J.—

In this case seven accused were charged with committing theft of 18 bags of dried chillies to the value of Rs. 900, property in the possession of R. J. Jayaratna, Storekeeper, Subsidiary Foodstuffs Depot, Maradana, contrary to the provisions of section 369 of the Penal Code. The 2nd, 6th and 7th accused were found guilty of this offence and sentenced to a term of one year's rigorous imprisonment. The 1st, 3rd, 4th and 5th accused were convicted under section 394 of the Penal Code of dishonestly receiving or retaining stolen property knowing or having reason to believe the same to be stolen property and were also sentenced to a term of one year's rigorous imprisonment. The 1st and 5th accused have appealed against their convictions.

The first point taken on behalf of the appellants is that there was a misjoinder of charges and that it was not open to the District Judge to find any of the accused guilty of an offence under section 394 of the

Criminal Procedure Code. Section 184 of the Criminal Procedure Code deals with the joinder of charges against more persons than one and is worded as follows :—

"When more persons than one are accused of jointly committing the same offence or of different offences committed in the same transaction or when one person is accused of committing any offence and another of abetment of or attempt to commit such offence, they may be charged and tried together or separately as the court thinks fit ; and the provisions contained in the former part of this chapter shall apply to all such charges."

The accused in this case were charged with committing the same offence and hence *prima facie* there would appear to be no misjoinder. Again there would be no misjoinder if some of the accused had been charged under section 369 and some under section 394, provided that these different offences were committed "in the same transaction". Section 184 of the Criminal Procedure Code must be read with sections 181 and 182 which are worded as follows:—

181. If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with all or any one or more of such offences and any number of such charges may be tried at one trial and in a trial before the Supreme Court or a District Court may be included in one and the same indictment ; or he may be charged with having committed one of the said offences without specifying which one.

Illustration.

A is accused of an act which may amount to theft or receiving stolen property or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust, and cheating, or he may be charged with "having committed one of the following offences, to wit, theft, receiving stolen property, criminal breach of trust, and cheating".

182. If in the case mentioned in the last preceding section the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed although he was not charged with it.

Illustration.

A is charged with theft. It apears that he committed the offence of criminal breach of trust or that of receiving stolen goods. He may be convicted of criminal breach of trust or of receiving stolen goods (as the case may be) though he was not charged with such offence.

The first point that arises for decision is whether in the event of its being doubtful whether some of the accused are guilty of theft or dishonestly receiving stolen property, it is open to the Crown to join all of them in one charge even if the "theft" and dishonest receiving were not

committed in the same transaction. Counsel have not been able to cite any authority covering this point. Can it be said in this case that the "act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute"? I am of opinion that it can be so said in the case of the 1st, 3rd, 4th and 5th accused. It was proved at the trial by the witness Wappu, a watcher employed by the Marketing Department, that the 2nd accused who was employed as a watcher at the Panadure Motor Transit Company Garage came to him about midnight and told him that they were going to do a certain thing and wanted him to be quiet. Then he saw the 6th and 7th accused, who were watchers at the Subsidiary Foodstuffs Depot, remove in conjunction with the 2nd accused 24 bags of chillies in all from the depot to the Panadure Motor Transit Company Garage and from the garage to the lorry. This witness although saying that there were others helping the 2nd, 6th and 7th accused stated that he did not see the 1st, 3rd, 4th or 5th accused. The evidence of Sub-Inspector Basnayake was to the effect that about 2.30 A.M. the same morning he was in ambush at Darley Road—McCallum Road junction with other Police when lorry No. X 1115 came from the direction of the Subsidiary Foodstuffs Depot and turned into Darley Road and proceeded in the direction of Union Place. The Sub-Inspector followed in a patrol car and overtook the lorry which had no lights other than a hurricane lamp burning by the side of the driver. The lorry was overtaken and stopped. The 5th accused was the driver, whilst the 1st accused was in the front seat. The 3rd and 4th accused were behind. The lorry was loaded with 18 bags of chillies. The 5th accused handed the Sub-Inspector Rs. 100 in Rs. 10 notes. On statements made by the 1st and 5th accused the Sub-Inspector went to the Subsidiary Foodstuffs Depot in McCallum Road. There he found an open shed with bags of chillies in them. The 1st accused is a trader having a boutique in Dean's Road. The 3rd accused is a mechanic working in McCallum Road, the 4th accused is a servant employed by the 1st accused, whilst the 5th accused was a lorry driver who worked for the Panadure Motor Transit Company and at the time of this offence was employed by Messrs. Brooke Bond, Ltd. The interval of time between the actual removal of the bags from the shed and their removal from the garage in the lorry was very short. In these circumstances all the accused, if guilty knowledge was established, were in possession of recently stolen property and could therefore have been found guilty of theft. In fact the District Judge in his judgment says "it would seem that all the seven accused have planned jointly with one common purpose to commit this theft". In the circumstances I think there was so far as some of the accused were concerned a measure of doubt as to whether the Court would draw the inference that the facts constituted theft or dishonest receiving of property. In this connection I would refer to the decision of Canekeratne J. in *Wijeyeratne v. Menon*[1]. The joinder of all the accused in one charge was therefore in order.

In this connection the use of the word "accused" in section 181 includes both the singular and the plural, *vide* section 2 (*x*) of the Interpretation Ordinance, Cap. 2. If such joinder is legal, I am of opinion it follows

[1] *(1947) 48 N. L. R. 164.*

that it is open to the Court to find some of the accused guilty of theft and some of dishonest receiving. Section 182 must be read with section 181. Thus if after evidence has been given it is found that the accused committed a different offence with which he might have been charged under section 181, then section 182 can be availed of.

I am also of opinion that the offence, namely, dishonest receiving, of which the 1st, 3rd, 4th and 5th accused were found guilty, was committed "in the same transaction" as the offence, namely, theft, of which the 2nd, 6th and 7th accused were found guilty. Hence joinder of such offences was permissible under section 184 of the Criminal Procedure Code. Various decisions have been cited by Counsel for the appellants, but none of them seem to be exactly in point so far as the facts of this case are concerned. In *Inspector Sourjah v. Hinnihamy*[1]. Soertsz J. held that the joinder of charges of house-breaking and theft against one accused with a charge of returning stolen property against another is a fatal irregularity. In this case, however, all the accused were charged with theft. Moreover, the judgment of Soertsz J. does not deal with the position that arises when the case comes within the ambit of section 181 of the Criminal Procedure Code. In *P. Albertu Fernando v. S. E. Fernando*[2] two persons were charged together, the one with stealing a bull the other with dishonestly receiving the animal from the first. It was held that the offences were distinct and the accused could not be charged together at one trial. The interval of time precluded a presumption that the two offences formed one transaction. Moreover, in the present case the accused were charged with the same offence. In *Police Sergeant v. Semijah*[3] Wood Renton C.J. held that there was a misjoinder where in the same charge one accused was charged with the theft of a bull and the other with unlawful possession of beef there being no evidence to connect the beef with the bull alleged to have been stolen. In *Jonklass v. Somadasa*[4] it was held by Wijeyewardene J. that community of purpose and continuity of action are essential elements necessary to link together different acts so as to form one and the same transaction within the meaning of section 184 of the Criminal Procedure Code. In this case I am of opinion that there was continuity of action. The community of purpose was the theft and disposal of the chillies. Our attention was also invited to various Indian decisions. It has been a matter of some difficulty to reconcile these decisions. In *Bishnu v. Empress*[5] it was held that when goods are stolen and subsequently received, it will depend on the circumstances whether the theft and the receipt are parts of one and the same transaction. So that the thief and the receiver can be tried together. Reference was made to the case of *Bishnu v. Empress* in the judgment of Stephen J. in *Abdul Majid v. Emperor*[6] in the following passage on pages 1263-1264 :—

> "The question then arises : Were they accused of different offences committed in the same transaction ? It is to be noticed that the four of them, whose charges alone are before us, were charged with retaining only and not as they might have been, with retaining and receiving.

[1] *(1937) 8 C. L. W. 20.*
[2] *(1913) 1 Ceylon Criminal Appeal Reports 30.*
[3] *(1914) 3 Balasingham's Notes of Cases 361.*
[4] *(1942) 43 N. L. R. 284.*
[5] *(1897) 1 C. W. N. 35.*
[6] *(1906) 33 Calcutta 1256.*

It may be, however, that in this case this makes no difference, because an illegal receiving may be presumed from an illegal retention. Taking this to be so, and that we are to consider retaining to be the same thing as receiving, it appears from the case of *In re A. David (1880) 5 C. L. R. 574* that where one prisoner stole and another received, they committed different offences in the same transaction, but this is subject to the qualification mentioned in *Bishnu v. Empress (1897) I. C. W. N. 35* that the offence of receiving must have been committed simultaneously with, which must mean very soon after, that of stealing. In the present case there is no evidence as to the circumstances under which the receiving took place; it may have taken place several days after the theft; the property may even have passed through several hands before it came into the possession of the accused. It is therefore impossible to hold that the offence of receiving by the petitioner and the offence of stealing by the unknown thief were offences committed in the same transaction within the meaning of section 239. Still less, as it seems to me, can it be held that the offences of the different accused were so connected. Consequently it follows that the joint trial of the accused was not according to law".

The two Indian cases I have cited were also followed in the case of *Ohi Bhusan Adhikary and another v. Emperor*[1].

In the present case in my opinion the offence of receiving must have been committed very soon after that of stealing and hence the two offences form parts of one and the same transaction so that the theif and the receiver can be tried together.

Apart from the question of misjoinder Counsel for both the appellants have contended that the prosecution have not discharged the burden of proof. In *R. v. Abramovitch*[2] it was held that

"The onus of proving guilty knowledge always remains upon the prosecution. The judge, in directing the jury, should, where the circumstances of the case require it, tell them that, upon the prosecution establishing that the prisoner was in possession of goods recently stolen, they may, in the absence of any explanation by the prisoner of the way in which the goods came into his possession, which might reasonably be true, find him guilty but that, if an explanation be given which the jury think might reasonably be true, and which is consistent with innocence, although they are not convinced of its truth, the prisoner is entitled to be acquitted, inasmuch as the prosecution would have failed to discharge the duty cast upon it of satisfying the jury beyond reasonable doubt of the guilt of the prisoner."

This decision represents the law as always followed in Ceylon, vide *Fernando v. Heiler*[3]. The appellants were entitled to be acquitted if the District Judge combining the functions of Judge and Jury thought that their explanations might reasonably be true inasmuch as in such circumstances the Crown would have failed to discharge the duty cast upon it to satisfy the Court beyond reasonable doubt of the guilt of the accused. The District Judge has held that the explanations of the appellants were not

[1] *I. L. R. 46 Calcutta 741.* [2] *(1915) 84 L. J. K. B. 396.*
[3] *(1945) 46 N. L. R. 406.*

reasonably true. It is impossible to say that he was not justified in coming to this conclusion. In regard to the 5th accused, on his own admission, when giving evidence, he consented to drive the lorry belonging to the Panadure Motor Transit Company at a very late hour at the request of the watcher. He had previously been an employee of the Company and hence must have known that what was going on was not above board. Moreover on arrest he handed Rs. 100 to the Sub-Inspector. I consider the District Judge was right in holding that his explanation was not reasonably true. *A fortiori* the explanation given by the 1st accused was not one that could be reasonably accepted by the District Judge.

It has also been contended by Counsel for both the appellants that exclusive possession necessary for their conviction was not established in the case of the 1st and 5th accused. Guilty knowledge of these accused was established beyond reasonable doubts. In my opinion a conspiracy to remove the stolen articles on the lorry was proved. In these circumstances the exclusive possession of the 1st accused who was the buyer of the goods and the 5th accused who was the driver of the lorry transporting them was established. For the reasons I have given the appeals are dismissed.

JAYETILLEKE J.—I agree.

Appeals dismissed.