Present: Bertram C.J. and Ennis and De Sampayo JJ. 1924.

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770—P. C. Colombo, 2,396.

Retaining stolen property—Presumption of guilt from recent possession—Counter presumption of innocence of accused—Benefit of the doubt—Burden of proof—English law of evidence for questions not provided for—"May presume"—"Soon after"—"Unless he can account for his possession"—"Reasonable explanation"—"Explanation which may reasonably be true"—Obligation of accused to call witnesses named by him in support of his explanation—Penal Code, s. 394—Evidence Ordinance, ss. 100 and 114.

A stolen pair of nail scissors was found within about fifteen days of the loss in the locked drawer of a locked almirah of which the accused had the keys. The accused, when charged with dishonestly retaining stolen property, said that he did not put them there, but that his son had access to the almirah, and that he frequently gave him the keys. He also said that his son had bought them from one Junaideen. He named Junaideen and his son as his witnesses, but did not call them at the trial. The Magistrate said in his judgment: "It cannot be disputed that the explanation given by the accused may reasonably be true," and also "I am not satisfied with the explanation." He acquitted the accused, following the principle laid down in *Perera v. Marthelis Appu.*[1] The Supreme Court affirmed the order of acquittal.

BERTRAM C.J.—The possession of property recently stolen casts upon the possessor the necessity or onus of giving an account of that possession. But this principle must be considered in the light of an overriding counter-presumption, namely, the presumption of the innocence of the accused. This is what is meant when it is said by the burden of proof, notwithstanding any presumption which may arise from the facts, lies upon the prosecution throughout.

The principles laid down by the Court of Criminal Appeal in England in *R. v. Abramovitch*[2] and by the Supreme Court on *Perera v. Marthelis Appu* (*supra*) considered and explained.

"By 'an explanation which may reasonably be true,' I think Lord Reading simply meant 'a reasonable explanation.'"

"To say that an explanation is reasonable means that it is reasonable in all the known circumstances of the case. Whether an explanation in any particular case is a reasonable explanation will depend on all sorts of factors, such as the status, the manner, the demeanour of the accused; the explicitness and fulness of the explanation, or, on the contrary, its meagreness and reserve; on the readiness or reluctance of the accused to support it by oral or documentary evidence where such evidence should be available.

[1] *(1919) 21 N. L. R. 312.* [2] *(1915) 84 L. J. K. B., 398.*

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But if there is any circumstance which entitles the Court or the jury to say that the explanation is false, and the Court or jury so finds, then such explanation cannot be considered reasonable."

Where an accused mentions witnesses in support of his explanation, the question whether it is reasonable for the accused or for the prosecution to cite the witnesses must depend on the circumstances of the case. It is not likely that the thief from whom the accused received the property will give a frank account of the circumstances, and allowance must be made for any reluctance on the part of the accused to call him.

ENNIS J.—In considering whether an accused has accounted for his possession of stolen property, the strength of the presumption to be dispelled must first be ascertained. How "soon after" the theft was it found in the accused's possession? The presumption gets weaker as time goes by, till the point is reached where no presumption can be drawn. That point of time will vary according to the nature of the article. If it be a common thing readily passing from hand to hand in the every day business of human life without much thought such as a pair of scissors, the point would soon be reached . . . . Whether any particular person would be likely innocently to possess such a pair would depend on his status in life, and once again the point of time will vary with that status. To say that the accused has not satisfied the Court that "he came by the property honestly" is a vague ground for rejecting an explanation, and it overlooks the main question which is always: "Does the evidence prove beyond a reasonable doubt the guilt of the accused. The evidence must establish the guilt of the accused, not his innocence. His innocence is presumed in law."

THE facts are set out in the following judgment of the Police Magistrate (W. J. L. Rogerson, Esq.) :—

The following are the reasons for my decision in this case. It is a rather difficult case of retaining stolen property. A silver manicure set was stolen from Stewart place. On information received the Criminal Investigation Department Inspector searched the house of accused. The latter produced the keys and in the locked drawer of a locked almirah was found the pair of scissors belonging to the stolen set. These facts are admitted.

I do not know what explanation accused gave of his possession to the police, as the police are not allowed to give evidence of statements made by the accused unless the defence puts such questions, which in this connection it may be advisedly they refrained from doing. I further assume that the explanation was not satisfactory, or accused would not have been charged under section 394. In view of the finding of these presumptions, which I am entitled to make, I called on the accused for his defence. When answering the charge accused had said: "My son bought this from Junaideen; I did not know about it," and he named as witnesses Junaideen and Pitche. Now, Junaideen has been convicted of retaining another part of the same set. Accused gave evidence on his own behalf that he allows his son to have access to the almirah, and that he lends him the keys for this purpose, and that he was not aware that his son had put the scissors in the almirah. He adds that he is a man of means, intending the Court to infer that

he is not the kind of man to be a depository of stolen property of scarce value, such as this pair of scissors. It will be noticed that all those statements of accused are, so to speak, *exparte*. They are not corroborated. He does not call his son who it appears is in the list of prosecution witnesses. I have nothing before me to corroborate accused. As to his means, he might be a man of means who had made his living by dealing in stolen property, and could not resist the temptation of former habits. He has not allowed me to know what explanation he gave to the police when the scissors were found. That is the case against accused. In his favour it may be said that it does not appear to have hindered the police at their search. He produced the keys when demanded. No other stolen property was found in the house. He is not apparently a dealer at present.

Mr. de Jong for accused has quoted the Chief Justice's decision in *21 N. L. R., p. 312*. The law as expounded there was followed by Mr. Justice de Sampayo in *23 N. L. R., p. 337*. In the former decision the principles which govern the question are fully discussed. In that case as in this, we have to merely ask ourselves whether it is reasonable in the circumstances of the case to presume that the articles were knowingly retained by the person in whose possession they were found. The Chief Justice continues: "It has been customary to say 'Here is a man found in possession of recently stolen property. It is for him to say how it came into his possession. The onus is shifted on him. If he does not satisfy the Court that he came by the property honestly he should be convicted.' I have often put the principle in this way myself, and it has the high authority of a Lord Chief Justice of England. A recent case has however put the principle on a more exact basis. That case is *R. v. Abramovitch.*[1] It is a case which has attracted some attention, and, indeed, is causing misapprehension, so that in a case Darling J. remarked that 'it had become a positive nuisance.' The law as now laid down by Lord Reading C.J. and the other Judges is as follows:—'In a case where a charge is made of receiving stolen property well knowing the same to have been stolen, where the prosecution have proved that the person charged was in possession of the goods and that they had been recently stolen, if an explanation has been given by the accused, then it is for the jury to say whether on the whole of the evidence they are satisfied that the prisoner is guilty. If the jury thinks that the explanation given may reasonably be true, although they are not convinced that it is true, the person is entitled to be acquitted, inasmuch as the Crown would then have failed to discharge the burden imposed on it by law, of satisfying the jury beyond reasonable doubt of the guilt of the prisoner. The onus of proof is never changed in these cases, it always remains on the prosecution.'" It now remains to apply the principle there stated.

It is I think obvious that if this principle is applied in the present case, the accused must be acquitted. He has given in Court an explanation which may reasonably be true even if we are not satisfied of its truth. There is not enough material to satisfy us of its truth, but it can hardly be disputed that it may reasonably be true.

It will also be admitted that the principle thus stated is very different from that stated by Lord Alverstone and previously applied by the Chief Justice of Ceylon. If I had applied that prineiple to this case I hould have convicted the accused, as I am not satisfied that he came by the stolen property honestly. If accused had known that principle governed his case, he must have called as witnesses his son and

[1] *(1915) 84 L. J. K. B. 398.*

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Junaideen. However, as His Lordship the Chief Justice has applied the new principle, and Mr. Justice de Sampayo has followed that decision, this Court is bound to do the same. I may venture, however, with all respect to express my opinion in this very important question I would draw attention to the words "the burden imposed by our law of satisfying the jury beyond reasonable doubt of the guilt of the prisoner." It appears to me that it was this very judgment that imposed this burden on the Crown for the first time. Previously the principle appears to have been that stated by Lord Alverstone, "the possession of recently stolen property throws on the possessor the onus of showing that he got it honestly." The principle laid down by Lord Reading is therefore not an absolute principle of law, but a new principle replacing a former one. If I may presume to say so it appears to me that the principle stated by Lord Alverstone is of the two more suitable to conditions in Ceylon. In England the police are able to prove the explanation, if any, given by the accused, when the goods were found in his possession and unless he adheres to that explanation at his trial the jury will draw an inference against his honesty. In Ceylon the accused may make any explanation that he likes at the time of the finding of the goods, and at his trial he may make any other explanation and the Court is not able to discover whether this explanation is the original one or a new one, unless the accused is prepared to question the police on the point. For in Ceylon a police officer is not allowed to give evidence of any statement made to them by an accused person. This artificial restriction on the prosecution seems to me to justify my opinion that the principle of Lord Alverstone is the most suitable to Ceylon law. If the new principle is adopted it imposes on the prosecution a burden which it will sustain with very great difficulty. It puts the accused in an unnecessarily advantageous position as is plainly shown by this case. It is true that the judgment in *R. v. Abramovitch* [1] states that the Court is not laying down any new statement of the law, but is merely re-stating it. But the judgment says: "The onus of proof is never changed in these cases, it always remains on the prosecution." Whereas Lord Alverstone had stated: "The possession of recently stolen property throws on the possessor the onus of showing that he got it honestly." With respect I find it difficult to understand how these two statements of the law are statements of the same principle, and do not express two different and contrary principles of law.

Garvin, K.C., S.-G. (with him *Dias, C.C.*), for Crown, appellant.

R. L. Pereira (with him *De Jong*), for respondent.

The following authorities were cited at the argument:—*(1911) 1 K. B. 149; 9 Hals., pp. 682, 368, section 719: 12 N. L. R. 278; 5 C. W. R. 237; 3 Bal. 204; 3 Cr. Ap. R. 1; 21 N. L. R. 312; 4 C. W. R. 355; 23 N. L. R. 337; Archbold, pp. 678, 312, 402; 2 Gour. p. 1901; 84 L. J. K. B. 397; 86 L. J. K. B. 810; 87 L. J. K. B. 733 & 735; 2 Cr. Ap. R. 217.*

May 14, 1924. BERTRAM C.J.—

This case was set down for argument before a Court of three Judges in view of certain perplexities which seem to have been caused by a judgment of the Court of Criminal Appeal in England in the case of *R. v. Abramovitch* (*supra*) which was followed in this country in

[1] *(1915) 84 L. J. K. B. 398.*

Perera v. Marthelis Appu[1] and *Kandiah v. Podisingho*.[2] These perplexities, as will be seen, have not been confined to this country, and, indeed, it was pointed out in *Perera v. Marthelis Appu* (*supra*) that Darling J., speaking of the case of *R. v. Abramovitch* (*supra*), said that it had become " a positive nuisance." The learned Magistrate, against whose judgment an appeal is taken in this case, has very lucidly explained the difficulties he has felt in following the principle laid down in that case, and has in effect asked for a reconsideration of that principle, at any rate, in its application to Ceylon. I will proceed, therefore, to submit that principle to further examination. I would, however, observe that the difficulty that has arisen in connection with *R. v. Abramovitch* (*supra*) has not been caused by the general principle which it enunciates, but by a particular expression in the judgment of Lord Reading C.J., and it will be necessary specially to consider that expression.

As a result of the examination of the authorities, the conclusions I have come to are as follows :—

The intention of the framers of the Indian Evidence Act was to codify and establish in India the principles of the English Law of Evidence (already in force in that country) subject to certain particular modifications supposed to be necessitated by local circumstances. These modifications are easily identified, and are not in conflict with the general purpose of the Act. Similarly, when our own Evidence Ordinance was passed, the Legislature entertained the same intention, and this was emphasized by section 100 which provided for recourse to the English law for the purpose of all questions not provided for. In construing any provision of our Ordinance it is, in my opinion, not only legitimate but necessary to have regard to this resumed intention of the Legislature, and in particular to the history of the principle embodied in the provision.

Now, it is one of the first principles of the English Law of Evidence that presumptions may be drawn without definite proof from facts which in the nature of things justify such presumptions. A fact so presumed is treated as true until the contrary is proved. The principle is thus framed in *Archbold, 22nd ed., p. 312* : "A presumption is where some facts being proved another follows as a natural or very probable inference or conclusion from them ; so as readily to gain assent from the mere probability of its having occurred, without further proof." The fact thus assented to is said to be presumed, that is, taken for granted until the contrary be proved by the opposite party. *Stabitur præsumptioni donec probetur in con rarium, Co. Litt., 272.* The same principle is expressed in other words in section 114 of our own Evidence Ordinance.

Now, though this principle is perfectly general in its terms, yet in practice it has come to be thought of in connection with certain definite categories, and the first and foremost of these categories,

[1] *(1919) 21 N. L. R. 312.* [2] *(1921) 23 N. L. R. 337.*

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both in the recognized text-books and our own Ordinance, is that of the possession of property recently stolen. It is a recognized presumption that the possessor of property recently stolen who can give no explanation, or no reasonable explanation, of his possession is either the thief or the receiver. This presumption is not a presumption of law, but a disputable presumption of fact. The principle may quite justly be put in this way that the possession of property recently stolen casts upon the possessor the necessity or onus of giving an account of that possession. It was, no doubt, in this sense that Lord Alverstone C.J. in *R. v. Powell*[1] said: "The possession of recently stolen property throws on the possessor the onus of showing that he got it honestly."

But this does not conclude the matter. There is a counter presumption of so fundamental a character as to override the presumption already explained. And it is in the light of this counter presumption that the former must be considered. This counter presumption, as I have indicated, is one of the most fundamental presumptions of the English criminal law though nowhere mentioned in the Evidence Ordinance—a circumstance which must be remembered when it is suggested, as it was originally suggested by the Acting Solicitor-General, that our Evidence Ordinance is intended to be a complete and exhaustive code. That presumption is the "presumption of innocence," and it is thus formulated in *Taylor on Evidence, 10th ed., p. 113* :—

> "One of the most important of disputable legal presumptions is that of innocence. This, in legal phraseology, 'gives the benefit of a doubt to the accused,' and is so cogent that it cannot be repelled by any evidence short of what is sufficient to establish the fact of criminality with moral certainty. In civil disputes, when no violation of the law is in question, and no legal presumption operates in favour of either party, the preponderance of probability, due regard being had to the burthen of proof, may constitute sufficient ground for a verdict. To affix on any person the stigma of crime requires, however, a high degree of assurance; and juries will not be justified in taking such a step, except on evidence which excludes from their minds all reasonable doubt."

This is what is meant when it is said that the burden of proof, notwithstanding any presumption which may arise from the facts lies upon the prosecution throughout, and it is this principle that the decision of the Court of Criminal Appeal in *R. v. Abramovitch* (*supra*) was intended to recall and to re-emphasize.

It will thus be seen that this decision did not, as the learned Magistrate suggests, introduce new law, but re-affirmed the old.

[1] *(1909) 3 Cr. Ap. R. 1.*

The principle of that decision is, moreover, of general application. It is not confined to cases of stolen property, but it applies to all cases in which a *primâ facie* case has been established against the prisoner, and he is called upon to answer it. Nor properly considered is there any inconsistency between that principle and the dictum of Lord Alverstone C.J. in *R. v. Powell* above quoted. If further assurance of this fact is needed it may be found in a statement of that principle by Lord Alverstone himself in *R. v. Stoddart*.[1] That was not a case of receiving stolen property but of obtaining money by false pretence, but the words are of general application.

On page 242 he says :—

> " The question, however, in this case is as to the direction which ought to be given where, as in this case, the defendant gave and called evidence in answer to that *primâ facie* case. It seems to us that the jury should have been told that if they accepted the explanation given by and on behalf of Stoddart, or if that explanation raised in their minds a reasonable doubt as to his guilt, they should acquit him, as the onus of proof that he was guilty still lay upon the prosecution. If upon the whole evidence the jury are left in a real state of doubt, the prosecution has failed to satisfy the onus of proof which lies upon them."

I may appropriately conclude this part of my judgment by citing an explanation of *R. v. Abramovitch* (*supra*) given by the Court of Criminal Appeal in the subsequent case of *R. v. Norris*.[2] Though the judgment of the Court is delivered by Avory J., it has the concurrence of Reading C.J. himself. He says : " In that case (*R. v. Abramovitch* (*supra*) the question arose as to whether the jury had been properly directed, and the Court came to the conclusion that the effect of the summing up was to impose on the prisoner the burden of proof ; and the Court in order to dissipate that view decided that the burden of proof was always on the prosecution to satisfy the jury that the prisoner knew that the goods were stolen at the time he received them. The question whether he has given a satisfactory explanation of his possession is to be taken into consideration as evidence as to whether he knew the property was stolen or not."

But the perplexity that has been created by *R. v. Abramovitch* (*supra*) does not arise so much from any difficulty in apprehending its principle, but from a particular expression used by Lord Reading in stating it. In framing this statement Lord Reading made a slight verbal departure from the customary phraseology. Instead of the ordinary expression " a reasonable explanation " he used the expression " an explanation which may reasonably be true "— " If the jury think that the explanation given may reasonably be true, although they are not convinced that it is true, the prisoner is

[1] *(1909) 2 Cr. Ap. R. 217 on p. 242.* [2] *(1917) 86 L. J. K. B. 810.*

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entitled to be acquitted." I doubt whether Lord Reading had any specific intention in making this verbal variation. By "an explanation which may reasonably be true," I think he simply meant, "a reasonable explanation." But the expression seems to have been interpreted as though it meant, "an explanation which is physically possible." At any rate, in *R. v. Norris* (*supra*) the jury found, firstly, that the prisoner's explanation might reasonably be true; and secondly, that it was not true in fact. It is satisfactory to note that it has been authoritatively declared by the judgment in this case that these two findings are incompatible.

To say that an explanation is reasonable means that it is reasonable in all the known circumstances of the case. As my brother Ennis has said, whether an explanation in any particular case is a reasonable explanation will depend on all sorts of factors, such as the status, the manner, the demeanour of the accused; the explicitness and fulness of the explanation, or, on the contrary, its meagreness and reserve; on the readiness or reluctance of the accused to support it by oral or documentary evidence where such evidence should be available. But if there is any circumstance which entitles the Court or the jury to find that the explanation is false, and the Court or jury so finds, then such an explanation cannot be considered reasonable.

It was no doubt with special reference to this sentence of Lord Reading that the Court of Criminal Appeal observed in *R. v. Badash* [1] that "it is a mistake to suppose that there is any special sanctity to be attached to the words of that judgment." It would seem to be better therefore to adopt as the test of the accused's liability not this sentence of Lord Reading, but the principle formulated by Lord Alverstone in *R. v. Stoddart* (*supra*). Even the explanation of *R. v. Abramovitch* (*supra*) given in *R. v. Norris* (*supra*) and quoted above is not free from pitfalls as it uses the expression "a satisfactory explanation." This seems to imply that the explanation must satisfy the Court, but that is not necessary; all that is necessary is that the explanation should inspire a reasonable doubt as to the truth of the charge. That principle equally applies whether a *primâ facie* case is met by giving or calling formal evidence or by a statement from the dock under section 188.

Before passing to the facts of the case, it may be well to consider a certain aspect of the matter, namely, the question of the obligation of the accused, where he mentions witnesses, to call those witnesses in support of his explanation. The cases on the subject are collected by Archbold in the section dealing with *Presumptions* (*Book I., part II., ch. 2, section 3*). In some cases it was held that the onus of calling witnesses to rebut the explanation lay upon the prosecution, *e.g.*, *R. v. Crawhurst* [2] cited by De Sampayo J. in *Kandiah v. Podisingho* (*supra*); in others it was held that it

[1] (*1918*) *87 L. J. K. B. 733.*

[2] (*1884*) *1 C. & K. 370.*

was not incumbent on the prosecution to call the witnesses to whom the prisoner had referred (see *R. v. Wilson*,[1] *R. v. Ritson*,[2] *R. v. Crawhurst* (*supra*)). The test adopted by Alderson B., in summing up to the jury, was : " that in cases of this nature you should take it as a general principle, that where a man, in whose possession stolen property is found, gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it, and who is known to be a real person, it is incumbent on the prosecution to show that the account is false ; but if the account given by the prisoner be unreasonable or improbable on the face of it, the onus of proving its truth lies on him." It is perhaps best to say that whether it is reasonable for the prisoner or for the prosecution to cite the witnesses must depend on the circumstances of the case. The case of *Kandiah v. Podisingho* (*supra*) decided by my brother De Sampayo was a case in which it was not reasonable that the accused should be called upon to cite the witnesses. But in all these cases it should be borne in mind that if the property really was stolen, the witness referred to as the person from who the prisoner received it is almost certain to be directly or indirectly connected with the crime. It is not likely that such a witness will give a frank account of the circumstances, and allowance must be made for any reluctance on the part of the accused to call him.

The Solicitor-General has pressed upon us the circumstance that these principles have been evolved in England, where the explanation of the accused is, as a rule, given at once to the constable making the arrest, and where this explanation can be tendered in evidence at the trial ; whereas in Ceylon such an explanation cannot be tendered in evidence, and it would be useless for the prosecution to cite the witnesses mentioned in the explanation, because at the trial the prisoner might give a totally different explanation, and the Court would know nothing of what he originally said.

It is perfectly true that in *R. v. Kalu Banda* [3] this Court, differing herein from the Courts in India held that a statement by an accused person, though exculpatory and not confessional in intention, may yet be a " confession " under our own special definition, when from this statement taken in conjunction with other circumstances the Court is asked to infer the guilt of the accused. The Solicitor-General referred to a recent decision of the Privy Council which he suggests may some day induce us to reconsider this point of view. That may or may not be the case, but there is no occasion for us to go into this matter on the present appeal. So far as the calling of witnesses is concerned, this difference of law and practice does not seem to me seriously to matter, even though the original statement of the accused cannot be given in evidence. Our Code provides that as soon as he is brought before a Magistrate, or, at any rate, as soon as

[1] *26 L. J. M. C. 45.* [2] *15 Cox. 478 C. C. R.*

[3] *(1912) 15 N. L. R. 422.*

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the case for the prosecution is ready, he shall be given an opportunity of making a statement under section 188. The trial does not by any means always take place immediately upon such a statement, and it is always possible for the prosecution to ask for an adjournment for the purpose of making inquiries with regard to any witnesses mentioned by the prisoner. I see no reason why in such a case as this a prisoner's statement should not be taken by the Magistrate before an adjournment is ordered under section 189.

I will now proceed to consider the facts of the case. Here the stolen property was a pair of scissors—a person called Junaideen had been convicted of stealing it—the stolen property was found in the locked drawer of a locked almirah. The accused had the keys of both drawer and almirah. These facts were proved, and the only statement made by the accused was : " I am not guilty ; my son got this from Junaideen ; I do not know about it." He cited two witnesses—Junaideen himself and a person described as Pitche—whether this person is a son of the accused is not clear.

I think that the learned Magistrate was perfectly justified on the conclusion of the case for the prosecution in declining to accept this as a reasonable explanation and in calling upon the accused to enter upon his defence. This statement is altogether too meagre and perfunctory to be treated as a reasonable explanation. The accused on being called enlarged this explanation. He explained that his son (who appears to have been an adopted son) had access to the almirah ; that he lives in the house and that he is trusted by the accused ; that he is given the key when he wants it, and opens the almirah even in the absence of the accused. He did not profess to know when the son had put the property there. His explanation is in fact that the scissors *must* have been put there by the accused's son. Assuming that the almirah contained property of both the accused and the son (as to which no question was asked), this is, on the face of it, not an unreasonable explanation. The only question is whether the accused ought to have called his son to support it. Certainly, when a member of the accused's family is mentioned in this way, one might expect the accused to call him. A Magistrate might be justified in declining to treat such an explanation as reasonable, unless the member of the family were called. In the present case, however, the position is by no means clear. The son was in fact according to the statement of the Magistrate on the list of witnesses for the prosecution. The decision of the defence not to call the son may have been affected by this circumstance, and also possibly by a misinterpretation of the sentence in Lord Reading's judgment above referred to. I think it would certainly have been more satisfactory if the son had been called, and as I have said this would be a case in which it would be natural that the onus of calling the son should lie upon the accused. The learned Magistrate, as I read his judgment, did not, in fact, believe the story of the

accused, that is to say, he was not convinced that it was true. He says : " There is not enough material to satisfy us of its truth," and again : " I am not satisfied that he came by the stolen property honestly." But he does not state that the prosecution had satisfied him of the guilt of the accused beyond all reasonable doubt. I am not prepared to say on the evidence in this particular case that he ought to have declared himself so satisfied, and I do not think that it would be just to the accused at this stage to send the matter back for further inquiry. The Solicitor-General did not seriously press for this course. What I understand to be chiefly desired is a further explanation of the general principles applying to the question. I trust that the explanation which we have given will be of assistance to those who have to administer the law. In my opinion the appeal must be dismissed.

ENNIS J.—

This is an appeal from an acquittal. The accused was charged with dishonestly retaining stolen property, knowing or having reason to believe it to be stolen property. The property in question was a pair of nail scissors which were found in the house of the accused in the locked drawer of a locked almirah of which the accused had the keys. The scissors formed part of a silver manicure set which was stolen with other jewellery from a house in Colpetty on November 2 by some thieves who had entered a bedroom while the owner of the property was at dinner. The accused gave evidence and admitted that the scissors were found in his almirah. He said he did not put them there, but that his son had access to the almirah ; that he trusted him and frequently gave him the key. It is here to be observed that, in answer to the charge, the accused had previously said that his son bought the scissors from one Junaideen, and he had named Junaideen and his son as witnesses. The accused was represented by counsel at the trial, but neither Junaideen nor the accused's son were called. The learned Magistrate in judgment discussed two cases, viz., *Perera v. Marthelis Appu* (*supra*) and *Kandiah v. Podisingho* (*supra*). He came to the conclusion that these cases introduced a new principle drawn from a decision of Lord Reading in the English case of *R. v. Abramovitch* (*supra*), a principle which he thought differed from the principle laid down by Lord Alverstone in *R. v. Powell* (*supra*) which had hitherto been followed in Ceylon. The Magistrate then said, with regard to the accused's explanation as to his possession of the stolen property that " it can hardly be disputed that it can reasonably be true," and that on the new principle he was bound to acquit. But he added that he was not satisfied that the accused came by the property honestly, and that on what he understood to have been the former principle he would have convicted the accused. It is to be observed that in *R. v. Abramovitch* (*supra*) it was expressly

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mentioned that the law there stated was not a new statement of the law, but merely a re-statement of it.

On appeal it was urged that the learned Magistrate had not applied himself to the real matter for decision in the case, but had decided on a misapprehension of the authority referred to by him.

I do not propose to discuss the English law on the subject, because the Ceylon law supplies sufficiently safe and explicit rules for the guidance of the Courts in arriving at a decision in such a case.

Section 114 of the Ceylon Evidence Ordinance, No. 14 of 1895, says that a Court *may* presume (illustration A) :—

> " That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession."

I have underlined the word *may*, because it cannot be too clearly stated that it is not necessary to make such a presumption in every case. The status, personality, or demeanour of the accused may be such as to stay the Court from making any such presumption in the one case, whereas in the other, with an exactly similar explanation, such a presumption may well be drawn. Again, the evidence led by the prosecution may have disclosed a view of the case which would make the drawing of such a presumption inequitable.

The next observation on this section, so far as this case is concerned is in connection with the words " *soon after.*" The theft was on November 2, the stolen scissors were found in the possession of the accused on November 17. Is this so " soon after " the theft as to give rise to the presumption ? It is a question of fact in each case which must be weighed with other facts in the case when all the evidence is passed in review before a decision is arrived at. It is sufficient to note for the moment that it affords time for the stolen property to have passed from hand to hand, even into innocent hands, by normal bargain and sale ; there is not that strong presumption that would arise if the goods had been found, for instance, the day after the theft.

Finally, there are the words " *unless he can account for his possession.*" From the point of view of Ceylon law, it is on the interpretation of these words that the case has come up on appeal. The learned Magistrate has, in effect, said : " It cannot be disputed that the explanation given by the accused may reasonably be true," and also : " I am not satisfied with the explanation." If, by the second statement, the learned Magistrate meant that he had a suspicion only that the explanation, was not true, then the decision to acquit the accused was right. But it has been urged on appeal that the Magistrate meant that the explanation, when weighed by a reasoning process, that is, considered with the other facts in the case, and having regard to the common course of natural events, human conduct, and business, was not reasonably true. Such a

construction would be in conflict with the statement which the Magistrate says cannot be disputed. For myself, I cannot help feeling that the Magistrate meant that the explanation was quite a possible one considered by itself, but not so when considered with other facts in the case. In considering whether an accused has "accounted for" his possession of stolen property, the strength of the presumption to be dispelled must first be ascertained. How "soon after" the theft was it found in the accused's possession? The presumption gets weaker as time goes by, till the point is reached when no presumption can be drawn. That point in time will vary according to the nature of the article. If it be a common thing readily passing from hand to hand in the everyday business of human life without much thought, such as a pair of scissors, the point would soon be reached. In this case the scissors were silver scissors worth Rs. 5, and whether any particular person would be likely innocently to possess such a pair would depend on his status in life, and once again the point of time will vary with that status. To say that the accused has not satisfied the Court that "he came by the property honestly" is a vague ground for rejecting an explanation, and it overlooks the main question which is always—Does the evidence prove beyond a reasonable doubt the guilt of the accused? The evidence must establish the guilt of the accused, not his innocence. His innocence is presumed in law from the start of the case, and his guilt must be established beyond a reasonable doubt. What such a reasonable doubt is can be gathered from the definition of "proved" in connection with "fact" given in the Evidence Ordinance :—

> "A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

If the explanation is so probable, in the circumstances that a prudent man would accept it, then there is a reasonable doubt as to the guilt of the accused, or no presumption from his possession of the property can safely be made. In the present case the learned Magistrate in effect says that the explanation given is, on the face of it, a probable one. Are the circumstances of the case such as to show that the probability is "*so*" probable that a prudent man would accept it.

The learned Magistrate has not told us anything as to the manner in which the accused gave his evidence, and we do not know how the demeanour of the witnesses impressed him. As I have indicated there is only one final question in every criminal case. Does the evidence establish beyond a reasonable doubt the guilt of the accused? And it is upon this question that the importance of the

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word " evidence " stands out. According to the Ceylon Evidence Ordinance, the word " evidence," for the purpose of that Ordinance, means the statements of witnesses called " oral evidence," and all documents produced for the inspection of the Court called " documentary evidence." But " evidence " for the purpose of determining the guilt of an accused is far more than this. It includes everything which a prudent man would observe, note, and act upon in ascertaining truth. The absence of a document, the manner in which oral testimony is given, the sincerity of a witness, his carriage, his look, his hesitancy or promptitude, and a thousand and one other matters which are neither oral nor documentary evidence. For instance, if the master's stolen watch is found in the servant's pocket, and the servant, accused, says " I do not know how it got there, some one must have put it there," he probably will not be believed, but he may speak with such obvious truth and dignity as to carry conviction. So also, if the servant's stolen watch is found in the master's pocket, and the master, accused, says : " I do not know how it got there, some one must have put it there," he probably will be believed, unless his manner is so evasive and furtive as to leave the truth of his words in doubt. The explanation is the same in both cases, the decision may well be different. The Court has to consider " *the matters* " before it as shown in the definition of " proved " already cited.

We are in appeal called upon to say, without the advantage of hearing and seeing the witnesses and without knowing the Magistrate's views, whether a verdict of acquittal should be set aside. We start, therefore, by observing that nothing for or against the truth of the testimony has been noted as regards the demeanour of the witnesses.

The Magistrate has drawn an inference adverse to the accused, from the fact that he does not know what explanation was made by the accused to the police at the time of his arrest, he assumes that the explanation was not satisfactory, or the accused would not have been charged. No such assumption can be made. The police will proceed with a case when they think that there is sufficient ground for proceeding, just as a Magistrate will issue a summons under section 151 of the Criminal Procedure Code when he is of opinion that there are *sufficient grounds for proceeding*. No assumption adverse to the accused can be drawn from the fact that he has been charged. Then the Magistrate has commented adversely on the fact that the accused did call evidence in corroboration of his own. He did not call his son or Junaideen. Both these men were on the list of witnesses for the prosecution. It may be assumed that if the son were ready to give evidence that would help to prove the guilt of the accused, he would have been called by the prosecution. With regard to Junaideen the Magistrate tells us that he has been convicted for retaining some of the rest of the property

stolen, when the scissors were stolen. It is difficult to see how it could serve the accused to call a convicted thief.

In favour of the accused the Magistrate observes that he does not appear to have hindered the police in their search. He produced the keys when demanded, and no other stolen property was found in his house. The accused stated that he was a well-to-do man; that he owned properties which he leased out; and that Junaideen had taken a sub-lease of one of these properties from a tenant of his. These facts are borne out by a witness for the prosecution, Haniffa, who said that at one time he was a rent collector for the accused, but never collected any rent from Junaideen. As this witness had himself been sued by the accused, his evidence can probably be relied upon. The purchase of a pair of scissors worth Rs. 5 by the son of such a man from a person whom he might meet and speak to daily would not be *primâ facie* an unlikely event, and, as the son lived with the father, anything purchased by the son would be likely to be found in the father's house. The fact that ample time elapsed, after the theft and before the discovery of the scissors, for a thief to have disposed of pieces of the stolen property to ordinary purchasers and the likelihood of his doing so, supports in some degree the accused's story, and the fact that a single item only, out of many stolen, is found in the house of the accused also makes the story less unlikely.

In view of all these facts, it is not possble on appeal to say that the accused should not have been acquitted. I would accordingly dismiss the appeal.

DE SAMPAYO J.—

The question which was intended to be settled by this appeal has been fully discussed by my Lord the Chief Justice and my brother Ennis. I agree with the view expressed by them, and there is nothing which I can usefully add.

Appeal dismissed.