1968 *Present :* **Weeramantry, J.**

T. D. VICTOR, Appellant, *and* INSPECTOR OF CRIMES, HARBOUR POLICE, Respondent

S. C. 65/68—J. M. C. Colombo, 37754

Customs Ordinance (Cap. 235)—Section 166 (1)—Offence of possessing an article suspected to have been stolen—Ingredients of the offence—Burden of proof.

In a prosecution under section 166 (1) of the Customs Ordinance for possessing an article suspected to have been stolen—

Held, that section 166 (1) of the Customs Ordinance postulates two requirements as being necessary to the conviction of a person in possession of an article suspected to have been stolen. They are firstly that such person does not give an account to the satisfaction of the Magistrate as to how he came by such article and secondly that the Magistrate should be satisfied that having regard to all the circumstances of the case there are reasonable grounds for suspecting such article to be stolen. In regard to the second requirement, the mere acceptance of the prosecution version and the rejection of the defence does not amount to a finding by the Magistrate that he is satisfied that there were reasonable grounds for suspecting the article to have been stolen. It involves an independent inquiry on which independent findings are required.

"When special offences of this nature are created by the Legislature and in particular in the case of offences involving a reversal of the usual rules of proof, it is of the utmost importance that there should be the strictest and most scrupulous insistence on those factors which the Legislature itself has postulated as pre-requisites to a conviction."

APPEAL from a judgment of the Joint Magistrate's Court, Colombo.

E. A. G. de Silva, for the accused-appellant.

S. W. B. Wadugodapitiya, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

March 29, 1968. WEERAMANTRY, J.—

The accused appellant in this case, a labourer employed under the Port Cargo Corporation, was charged with the theft of an empty polythene bag reasonably suspected to have been stolen from warehouse No. 3, Delft Quay, in the Port of Colombo, an offence punishable under section 166 (1) of the Customs Ordinance, Chapter 235. The accused was found guilty of this offence and sentenced to pay a fine of Rs. 10, and to undergo one week's rigorous imprisonment in default.

The case for the prosecution was that around 9 p.m. on the day in question the accused and some other employees of the Port Cargo Corporation, when coming out of warehouse No. 3, were observed to

have in their possession certain polythene bags in which ammonia was usually packed. These bags were being carried at the time under their arm pits and contained the clothes of these labourers. The prosecution contended that the polythene bags were property belonging to warehouse No. 3 and that the accused entertained a theftuous intention in regard to the polythene bag he carried.

It would appear that it was not an unusual occurrence for labourers engaged in unloading ammonia, to protect themselves by wearing discarded polythene bags round their waists, as was spoken to by a storekeeper of the Port Cargo Corporation who was called as a prosecution witness. This storekeeper stated further that he had seen labourers with these polythene bags wrapped round their waists going out of the warehouse and coming in after dinner. Their dinner time would appear to be between 9.00 and 10.00 p.m.

The officials of the Harbour Police who saw the labourers on that occasion stated that they were proceeding in the direction of the water tap presumably to wash their hands before or after their meal. Furthermore although there is no direct evidence on the matter, the water tap is itself clearly situated within the premises of the Port, for the charge is one of being found in possession of a suspected article within the limits of the Port. It cannot therefore bo concluded that merely because the labourers in question were going out of the warehouse they were attempting to take these bags out of the premises of the Port.

Another circumstance spoken to by the prosecution witnesses was that the polythene bags were not concealed but were being openly carried.

There was no evidence on the part of the prosecution proving that the bag which was found on the accused came from stocks in the warehouse, and the only attempt at identifying the bag as being one from the stores was evidence of similarity between a specimen bag taken from the stores and the bag in question. There was no identifying mark on the bag nor was the storekeeper able without his books to speak to the stock position. This deficiency in the prosecution evidence assumes particular importance in view of the evidence of the storekeeper himself that discarded bags were used for protective purposes by labourers as referred to earlier.

The accused himself gave evidence and stated that polythene bags are used by the labourers to wrap around their waists and that at dinner time which is between 9.00 and 10.00 p.m. the labourers go out of the warehouse for their dinner and after dinner wash their hands at the water tap. When they go for dinner as well as when they wash their hands they do not remove the bags which are round their waists. He admitted having the bag in question with him and denied that he entertained any theftuous intention in regard to it. The accused further stated that the supervisor had seen them use polythene bags for this

purpose but had never asked them not to do so. He also denied having ever taken polythene bags out of the harbour. The learned Magistrate rejected the evidence of the accused to the effect that he had no intention of commiting theft and observed that the accused could not have been wearing discarded polythene bags round his waist as according to the evidence he had his clothes wrapped in the polythene bag. In view of his rejection of the defence version and his acceptance of the prosecution evidence the Magistrate found the accused guilty of the charge.

The approach of the learned Magistrate to the case necessitates an examination of the section under which the charge is laid. It will be observed that section 166 (1) postulates two requirements as being necessary to the conviction of a person in possession of an article suspected to have been stolen. These are firstly that such person does not give an account to the satisfaction of the Magistrate as to how he came by such article and secondly that the Magistrate should be satisfied that having regard to all the circumstances of the case there are reasonable grounds for suspecting such article to be stolen.

The Magistrate has in the present case not been impressed by the account given by the accused as to how he came by such article. The defence submits that the Magistrate has overlooked the circumstance that the explanation is a reasonable one having regard to the prosecution evidence that there were abandoned bags which were used by the labourers without objection by the authorities, that the bag was being openly carried, that there was no material placed by the prosecution before the court to eliminate the possibility of the bag in question being an abandoned bag and that there was no evidence of any shortage of stocks in the warehouse. Be that as it may, there is a finding by the learned Magistrate on this matter which it would not be necessary to disturb having regard to the second requirement imposed by the section.

The section is in somewhat unusual terms in that it expressly requires the Magistrate to be satisfied that having regard to all the circumstances of the case there are reasonable grounds for suspecting such article to have been stolen. Hence the Magistrate should in fact be satisfied of the existence of these reasonable gounds. Nowhere in the order of the learned Magistrate does he give his attention to the question whether this is a bag which there are reasonable grounds for suspecting to have been stolen. Such a finding by the learned Magistrate becomes all the more important when one has regard to the circumstances stressed by the defence, which have been outlined in the preceding paragraph.

In support of his argument that the Magistrate should expressly give his mind to this question, learned Counsel for the appellant has cited the case of *Sammie v. Nagodu Police*[1] where Nagalingam J. had occasion to consider a similar point under the Rubber Thefts Ordinance. This Ordinance which appeared as Chap. 29 in Volume 1 of the 1938 edition of the Legislative Enactments, contained a section framed in phrascology

[1] *(1951) 53 N. L. R. 255.*

identical with that of section 166 (1) of the Customs Ordinance. Section 16 (1) of the Rubber Thefts Ordinance provided that any person found in possession of rubber suspected to have been stolen may be convicted of an offence under the Ordinance if such person does not give an account to the satisfaction of the Magistrate as to how he came by that rubber and the Magistrate is satisfied that, having regard to all the circumstances of the case, there are reasonable grounds for suspecting such rubber to have been stolen.

With reference to this latter provision, Nagalingam J. in the case cited has observed that the effect of this provision is that where the accused person can give an innocent explanation of his possession he is entitled to an acquittal although the rubber may in fact be stolen property. He further observed that it is only where the accused has failed to satisfy the Magistrate that his possession of the rubber was in circumstances which exclude any *mens rea* attaching to him, that the Magistrate is called upon to proceed further to satisfy himself that there are reasonable grounds to suspect such rubber to have been stolen. Moreover in that case the accused had in fact pleaded guilty, but despite this plea it was held that the Magistrate should be satisfied that there are reasonable grounds for suspecting the rubber to have been stolen.

We do not in the present case have any expression by the Magistrate of a view that having regard to all the circumstances of the case there are reasonable grounds for suspecting the polythene bag in question to have been stolen. Just as in *Sammie v. Nagoda Police* a plea of guilt was held to leave unaffected the requirement that the Magistrate should be so satisfied, so also in the present case the mere acceptance of the the prosecution version and the rejection of the defence does not amount to a finding by the learned Magistrate that he is satisfied that there were reasonable grounds for suspecting the bag to have been stolen. Indeed the latter involves an independent inquiry on which independent findings are required. An answer adverse to the accused on the question how he came to be in possession does not necessarily lead to an answer against him on the question whether the property is reasonably suspected to have been stolen. If a finding on the former question concludes the matter there is no reason why the legislature should expressly stipulate as an additional requirement that the Magistrate should be satisfied on this latter matter as well.

When special offences of this nature are created by the Legislature and in particular in the case of offences involving a reversal of the usual rules of proof, it is of the utmost importance that there should be the strictest and most scrupulous insistence on those factors which the Legislature itself has postulated as pre-requisites to a conviction.

There is also a decision on similar lines in *Hutchinson v. Wijesinghe*[1] where the Ordinance in question was as in the present case the Customs Ordinance. In that case Swan J. following Nagalingam J. in *Sammie v.*

[1] *(1953) 55 N. L. R. 431.*

Nagoda Police held that the Magistrate should have been satisfied that having regard to all the circumstances of the case there were reasonable grounds for suspecting the article to have been stolen from any ship, boat, quay, or warehouse within the Port of Colombo. Swan J. has there expressed the view that it was only after the learned Magistrate was so satisfied, that it would have become incumbent on the accused to give an account to the satisfaction of the Magistrate as to how he came by this article.

In reliance on the principle enunciated by Nagalingam J. in *Sammie v. Nagoda Police* I hold that the order cannot be sustained. In the absence of a finding as required by the section and in the circumstances of the accused having offered an innocent explanation not inconsistent with the prosecution evidence itself, I take the view that the prosecution has failed to prove the charge which it has laid against the accused.

I accordingly quash the conviction and acquit the accused.

Appeal allowed.