1919.

*Present:* Bertram C.J.

PERERA *v.* MARTHELIS APPU.

*892—P. C. Negombo, 33,281.*

*Recent possession of stolen property—Presumption of guilt—Authorities examined—Burden of proof—Penal Code, s. 394.*

On the night of September 14, 61 coconuts were plucked from sixteen trees on an estate. Next morning 60 freshly plucked nuts were found in a small cadjan enclosure situated at a distance of three to eight fathoms from the house of the accused, which was situated a quarter of a mile from the estate. The enclosure was surrounded by cadjans, which could have been opened and entered by anybody. In the house itself were 500 other coconuts ready for sale. These 60 coconuts were hidden in a ditch and covered over with cassava sticks. The accused was charged with dishonestly retaining stolen property (Penal Code, section 394). The accused said that there were persons who were ill-disposed towards him, and that it was possible that these persons had put the nuts into his enclosure in order to get him into trouble.

*Held*, that the burden of proof of innocence had not been shifted on to the accused, and that in all the circumstances of the case the Crown had not discharged the onus which lay upon it of proving beyond all reasonable doubt the guilt of the accused.

The authorities on the question of presumption of guilt arising from recent possession of stolen goods examined.

*Per* Lord Reading C.J. cited in the judgment:—"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 think that the explanation given may reasonably be true, although they are not convinced that it is true, the prisoner is entitled to be acquitted, inasmuch as the Crown would then have failed to discharge the burden imposed upon it by our 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."

THE facts appear from the judgment.

*A. St. V. Jayawardene*, for the appellant.

*Aserappa*, for the respondent.

December 19, 1919. BERTRAM C.J.—

The story of this case is as follows. On the night of September 14, 61 coconuts were plucked from sixteen trees on an estate at Aluthupola. Next morning 60 freshly plucked nuts were found in

a small cadjan enclosure situated at a distance which was variously put at three fathoms and eight fathoms from the house of the accused, which itself is situated about one-fourth of a mile from the estate in question. The enclosure was surrounded by cadjans about the height of a man, and could have been opened and entered by anybody. In the house itself were 500 other coconuts ready for sale. These 60 coconuts were hidden in a ditch and covered over with cassava sticks. This is practically the whole evidence. The accused is charged with dishonestly retaining stolen property. He does not give any definite explanation of the goods being found in his enclosure, but he says that there is a man called Andris, a reputed thief, who is on bad terms with him, and who lives within a "hoo" shout of his house, and that the watcher on the estate is a brother-in-law of Andris, and is also on bad terms with him. He does not, however, go so far as to charge Andris definitely with conspiring with the watcher to place the nuts within his enclosure. The learned Magistrate has found him guilty, and sentenced him to six months' rigorous imprisonment. I have been so struck by the number of charges of this character, both under section 394 of the Penal Code and under the various special Ordinances which have been passed for the protection of produce, that I thought it desirable to re-examine the authorities on the subject.

It is material to notice, in the first place, that the section under which the present charge is laid is not a section in any of the special Ordinances just referred to. The charge is under section 394 of the Penal Code. It is not a case in which for the better protection of property artificial presumptions have been created by statute. The case must be determined by the ordinary law of evidence, and the section of the Evidence Ordinance on which the court must base its decision is section 114, which simply declares "that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case." Under that section it is noted as an "illustration," but as an illustration only, that "the Court may presume that a man who is in possession of stolen property soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for their being in his possession."

We have not, therefore, to deal with any specific presumption created by statute, nor need we pay any attention to the decided cases which have interpreted the special words of statutes creating such presumptions. We have merely to ask ourselves whether it is reasonable in the circumstances of the case, assuming that we are satisfied with the indentity of the stolen article, to presume that they were knowingly retained by the person in whose possession they were found.

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It has always been a principle of the English criminal law that when a man is found in the possession of recently stolen property it is reasonable, that he should be called upon to give some account of his possession. The case is put in this way in a note to *Cockin's case:* [1] "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 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 on the matter as an honest man ought."

The principle has, however, often been stated much more strongly. 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 upon him. If he does not satisfy the Court that he came by the stolen property honestly, he should be convicted." I have often put the principle in this way myself, and such a way of stating it has, indeed, the high authority of a Lord Chief Justice of England, Lord Alverstone, who, in *R. v. Powell,* [2] stated it as follows: "The possession of recently stolen property throws on the possessor the onus of showing that he got it honestly." A recent case in the Court of Criminal Appeal has, however, put the principle on a more exact basis. That case is *R. v. Ambramovitch.* [3] It is a case which has attracted some attention and, indeed, occasionally some misapprehension, so much so that in a case cited in the Weekly Notes (1917), p. 373, Darling J. remarked that the case of *R. v. Ambramovitch* [3] has become "a positive nuisance." I have not, however, up to the present heard it cited in this Colony. The law as now laid down by Lord Reading C.J. and the other Judges in that case is as follows:— "In a case such as the present where a charge is made against a person of receiving stolen goods well knowing the same to have been stolen, when the prosecution have proved that the person charged was in possession of the goods, and that they had been recently stolen, the jury should then be told that they may, not that they

[1] *(1836) 2 Lew. C. C. 235.* [2] *(1909) 3 Crim. A. R. 1*

[3] *(1914) 84 L. J. K. B. 397.*

must, in the absence of any explanation which may reasonably be true, convict the prisoner. But 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 think that the explanation given may reasonably be true, although they are not convinced that it is true, the prisoner is entitled to be acquitted, inasmuch as the Crown would then have failed to discharge the burden imposed upon it by our 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. That is the law. In pronouncing it to be so, the Court is not giving forth any new statement of the law, but is merely re-stating it; and it is hoped that this re-statement may be of assistance to these who have to try these cases."

The conviction in that case was set aside, because it appeared that in charging the jury the learned Judge spoke in such a manner as to let it be supposed " that when once the Crown had established that the goods had been recently stolen and were in the possession of the persons accused, it was for them to satisfy the jury that the explanation they had given of the goods being in their possession was true. If that is the effect of the words used by the learned Judge, it would be a wrong direction in law to the Jury." See for comments on this case per Avery J. in *Rex v. Bailey* [1] and *Rex v. Norris*.[2]

It now remains to apply the principle thus stated to the facts of the present case. With regard to the identity of the nuts, the coincidence of those 60 nuts being found concealed in a place quarter of a mile from the spot where a corresponding amount of nuts was stolen a few hours before is so striking that I think that the learned Judge was justified in finding that the property found was stolen property. He was also, of course, perfectly right in saying that this was a case in which the prisoner was called upon to give an explanation. The prisoner gave a rather indefinite explanation. All he could say was that there were persons who were ill-disposed towards him, and it was possible that these persons had put the nuts into his enclosure in order to get him into trouble. The learned Judge has very minutely examined this explanation, and has declared that he cannot accept such a theory. In view of the more recent authorities explained above, he would appear to have directed himself with hardly sufficient exactitude. He should have asked himself, first, whether the explanation given could reasonably be true; and next, whether, upon the whole facts of the case, that explanation included the Crown had satisfied him beyond all reasonable doubt of the guilt of the prisoner. The learned Judge was undoubtedly justified in entertaining suspicions

[1] *(1917) W. N. 323.*

[2] *(1916) L. J. K. B., Vol. 84, p. 810.*

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but if we ask ourselves whether the explanation hinted at rather than put forward by the prisoner may, in the circumstances of this case, reasonably be true, there is only one possible answer. It would have been an easy thing for an enemy of the accused to have got these nuts plucked and to have hidden them in his enclosure. The learned Judge says that a person carrying out this design would be running a risk, and he doubts whether such a person would have got so many nuts plucked for the purpose. These are very pertinent comments, but it seems to me in the present case that it is impossible to say the suggested explanation may not be reasonably true. The onus of proof not being shifted, it is for the Crown to satisfy the Court, and the probabilities here are so evenly balanced that I do not think I should be justified in affirming the conviction. Had the coconuts been longer in the enclosure so that the accused had a substantial opportunity of finding them there, I think that the balance might have inclined the other way.

Every case must, of course, be decided upon its own facts, and individual decisions are not of very great assistance, except in so far as they illustrate principles; but there is a case in 14 Cox's Crown Cases which is on somewhat similar lines as the present case. A bag was missed by its owner on Saturday night. The prisoner passed the place where the bag was missed on his way home. The bag was found in a disused hay-loft in some farm buildings near the accused's cottage. There was no door to the hay-loft, and passers-by had easy access to it. The prisoner was convicted, but the Court of Criminal Appeal quashed the conviction (*R. v. Hughes.*) [1]

For reasons I have explained above the appeal is allowed.

*Appeal allowed.*

[1] *(1878) 14 Cox C. C. 223.*