1951 *Present:* **Gratiaen J. and de Silva J.**

SUMENASENA *et al.*, Appellants, *and* THE KING, Respondent

S. C. 17-18—D. C. (Criminal) Batticaloa, 6,314

Theft—Proof that accused knew where the stolen articles were concealed—Is that alone sufficient to support conviction for theft ?—Evidence Ordinance, s. 114 (a)—Penal Code, s. 366.

Where the only evidence against an accused is that he has pointed out stolen property in a place which is not in his possession, the presumption of guilt in terms of section 114 (*a*) of the Evidence Ordinance does not arise and that evidence alone is not sufficient to support a conviction for theft.

APPEAL from a judgment of the District Court, Batticaloa.

R. L. Pereira, K.C., with *S. Saravanamuttu* and *S. Sharvananda*, for the 1st accused appellant.

No appearance for the 2nd accused appellant.

A. Mahendrarajah, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

May 10, 1951. GRATIAEN J.—

There were three accused in this case. They were jointly charged—

(*a*) with having committed house-breaking by night on December 31, 1949, by entering into a Magazine belonging to the Morrison Knudson International Corporation at Inginiyagala in order to commit theft;

(*b*) with having, in the course of the same transaction, committed theft of 10 cases of detonators and 50 rolls of fuse valued at Rs. 13,170.

All the accused were found guilty of both charges by the learned District Judge, and sentences of imprisonment were passed on them. Only the 1st and 2nd accused have appealed against their convictions.

I shall deal first with the case of the 2nd accused who was not represented by Counsel at the appeal. I have examined the evidence against him with care, and am satisfied that he was properly convicted. It has been proved that, shortly after the theft occurred, he and the 3rd accused were found in possession of some of the stolen articles and that he attempted to dispose of them by sale. Later, at a place over 100 miles away from the scene of the burglary, he pointed out to the Police another portion of the booty. It has therefore been established that he had been in possession of some of the stolen property within a short time of the theft, and he has offered no explanation of this incriminating circumstance. The learned Judge was therefore entirely justified in applying to this case the presumption arising under section 114 (*a*) of the Evidence Ordinance. I would dismiss his appeal.

The case against the 1st accused stands on a different footing. It has been proved that, a few hours of the theft, he was observed in the company of the 2nd and 3rd accused (who have now been proved to have taken part in the burglary) at a public place about a mile away from the Magazine from which the detonators had been stolen. The learned Judge correctly points out, however, there was nothing incriminating in this circumstance taken by itself. There was no direct evidence—as there was against the others—that any of the stolen articles were at any time found in his possession. The learned Judge was impressed, however, by the effect of the testimony of two Police officers whose evidence was accepted by him. One of them said that, after the 1st accused had been arrested on suspicion, he pointed out a spot 100 miles away from Inginiyagala, and that when the vicinity was searched a large quantity of detonators was discovered there. The other Police officer stated that, on another occasion, the 1st accused took him to a fairly inaccessible spot in the jungle in close proximity to the scene of the burglary. The Police there discovered some parts of the packing cases in which the detonators had been stored by their owner before they were stolen.

What is the full effect of this circumstantial evidence against the 1st accused? Certainly it has been proved that he knew two of the burglars and was in their company in a public place some hours before

they took part in the burglary. The inference is also irresistible that he knew where some of the stolen articles had been concealed by all or some of the thieves. But I do not see how the prosecution can claim from these facts alone to have established beyond reasonable doubt that he had himself participated in the crime. The case against the 1st accused would only have been established if this circumstantial evidence was sufficient to justify the inference that he had himself been in possession of some of the stolen property before it was concealed in the places pointed out by him to the police. If such possession were proved, the situation would clearly demand from him some reasonable explanation in the absence of which a presumption of his guilt would be justified in terms of section 114 (*a*) of the Evidence Ordinance. If, on the other hand, what has been proved is equally consistent with some other hypothesis which has not been eliminated, all that can be said in the absence of proof of actual possession is that they are merely circumstances of very grave suspicion which, without more conclusive evidence, are not sufficient to justify conviction. True, the 1st accused made no attempt to explain any of these suspicious circumstances. But the principles of the criminal law do not demand an explanation of suspicious circumstances from an accused person unless a *prima facie* case has been made out against him, and he is therefore entitled to rely on the presumption of innocence and the infirmities of the case for the prosecution. *Wills on Circumstantial Evidence—7th Edition, pages 110-111.*

A situation such as we are considering has been the subject of many rulings of the Indian Courts where the Evidence Act contains provisions precisely similar to section 114 (*a*) of our Evidence Ordinance. It has been uniformly decided that " where the only evidence against an accused is that he has produced stolen property *from a place which is not in his possession*, that evidence is not sufficient to support a conviction for theft ". *Khushal Singh v. The Crown* [1]; *Paimillah v. Emperor* [2]; and *Public Prosecutor v. Pakkiriswami* [3].

In the present case, the places where the stolen articles had been concealed were admittedly not within the sole control of the 1st accused. Therefore it is left doubtful whether the accused *or some other person* concealed the stolen articles there, and the possibility has not been eliminated that, without participating in the burglary, *he had obtained information in some other way as to where the articles had been concealed. Queen Empress v. Gobinda* [4].

I have come to the conclusion, though not without regret, that the guilt of the 1st accused has not been established beyond reasonable doubt. I would quash his convictions and make order acquitting him.

DE SILVA J.—I agree.

Appeal of 1st accused allowed.

Appeal of 2nd accused dismissed.

[1] *A. I. R. (1923) Lahore, 335.*
[2] *13 Criminal Law Journal, 127.*
[3] *31 Criminal Law Journal 449.*
[4] *I. L. R. 17 All 576.*