1969 *Present :* de Kretser, J.

P. PABILIS, Appellant, *and* SUB-INSPECTOR OF POLICE, KAHATUDUWA, Respondent

S. C. 834/68—M. C. Horana, 44612

Penal Code—Sections 451 and 419—Offence of loitering about by reputed thief—"Being a reputed thief"—"Loitering"—Offence of unlawful possession of housebreaking instrument—"House-breaking instrument".

The accused-appellant was charged in that (1) being a reputed thief he was found loitering about a public place with intent to commit theft, and (2) he did possess without lawful excuse an instrument of house-breaking, to wit, a jemmy.

Held, (i) that it was open to the prosecution to lead evidence of the accused's previous convictions for theft for the purpose of establishing that he was a reputed thief. The fact that the officer who arrested him was not aware of his reputation at the time of arrest was irrelevant.

(ii) that the word "loiter" means "linger on the way ; hang about : travel indolently and with frequent pauses."

(iii) that an iron rod with a pointed end does not answer to the description of a "jemmy" and is not primarily an instrument of house-breaking.

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

Ranjit Gooneratne, for the accused-appellant.

Tyrone Fernando, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

February 26, 1969. DE KRETSER, J.—

The Magistrate of Horana (Mr. J. J. F. A. Dias) convicted the accused of the two charges laid against him which were : 1.... Being a reputed thief did loiter about a public place to wit Halpita with intent to commit theft...2.... Did possess without lawful excuse an instrument of house-breaking to wit a jemmy. He sentenced the accused on count 1 to six months' R.I. which was something he did not have the right to do for the offence if it was to be punished with imprisonment could only be with imprisonment up to three months. On count 2 the sentence was six months' R.I. and was consecutive to the sentence on count 1. The accused has appealed.

Counsel for the appellant urges three matters : 1. That it is not proved that the accused was a reputed thief. 2. That it is not proved that he loitered. 3. That the weapon he was in possession of was not a jemmy and that it is not established that it was intended to be used for house-breaking.

Counsel for the appellant cites the case of *Perera v. The Police* [1] in which de Silva J., said "It is not open to the prosecution to lead evidence of previous convictions to establish the fact that accused is a reputed thief. The evidence available for the prosecution must be evidence of the reputation of the accused apart from previous convictions." He also cited the case of *Mansoor v. Jayatilleke* [2] in which Dias J., said "..... The words of section 451 are 'Being a reputed thief', that is to say the burden is on the prosecution to show that *at the time the accused loitered or lurked about a public place* he had the reputation of being a thief. The prosecution does not discharge that burden by first arresting the accused on suspicion and then *ex post facto* establishing that he was a thief, a fact which was unknown at the time that the alleged offence was committed."

These two cases were before Tennekoon J., when he heard the appeal in S.C. 742/67 S. C. Minutes of 6.11.67 in which case the prosecution had proved five previous convictions for theft and the fact that the accused was an I. R. C. and known as such to the Police officer who arrested him in proof of the fact that he was a reputed thief. Tennekoon J. said "The proposition that the reputation of being a thief must exist at

[1] *(1946) 32 C. L. W. 103.*

[2] *(1947) 48 N. L. R. 308.*

the time of loitering is unexceptionable but with respect it seems to me that it is irrelevant that the arresting officer did not know that the accused had such a reputation at the time of arrest..... I cannot see why the fact of the accused being a reputed thief at the time of loitering which is one of the ingredients of the offence under section 451 of the Penal Code cannot be established independently of the arresting officer's knowledge of the accused's reputation." In agreeing with Tennekoon J. it appears to me that the error in the order of Dias J. is that Dias J. has lost sight of the fact that the reputation of the accused at the time he loitered is not dependent on the fact that the police officer was aware of it. e.g. If it is an offence for a Boy Scout to loiter in a public place the fact that a police officer who observed him loitering is unaware that he is a Boy Scout does not make him any the less a Boy Scout while he was so loitering.

What do the words in the section "*being a reputed thief*" connote? The adjective "reputed" according to the dictionary means "generally accounted or supposed to be such". A reputed thief therefore is one generally supposed to be a thief or generally accounted a thief. And it appears to me that there is no more certain way of a person being generally accounted a thief than to be convicted for theft more than once; and it appears to me as it did to Tennekoon J. that a person who has repeated convictions for theft is a thief who cannot but have the reputation of being a thief. It appears to me that de Silva J. had lost sight of this when he gave the dictum which I have quoted in this Order. In my view therefore it is open to the prosecution to lead evidence of a man's previous convictions for theft for the purpose of establishing that he is a reputed thief at the time he committed the offence, and the fact that the officer who arrested him is not aware of his reputation at the time of arrest is irrelevant. In the instant case the evidence is that of P. C. 7241 Perera who said "I know the first accused well and I identified him. I am aware that he has previous convictions for theft and that he is an I. R. C.". This evidence in my opinion clearly establishes that at the time of arrest the police officer was aware that the man was a reputed thief because he was personally aware that the man had previous convictions for theft and was an I. R. C.

It appears to me therefore that in any event the fact that the accused was a reputed thief was proved by the prosecution.

In regard to *loitering* the relevant evidence of the police officer is as follows: "I remember 12.3.67. At about 3.15 a.m. I was patrolling the Halapita area..... I saw the flash of a torch in our direction. We stopped. Then three men came and when they were about twelve yards away from us I flashed my torch at them..... when I ordered them to stop they started running."

The word "loiter" is defined in the Concise Oxford Dictionary as meaning to "linger on the way; hang about; travel indolently and with frequent pauses". Having regard to this definition it is clear that the

evidence of the prosecution does not establish that the accused was *loitering* on this day. The charge under section 451 therefore fails and I set aside the conviction and sentence imposed by the Magistrate.

In regard to count 2 Counsel submits that there is no evidence that accused was in possession of a " jemmy " as alleged in the charge. The evidence is that there was in his possession " an iron rod with a pointed end ". Under cross-examination it was got out that the other end was a blunt one. It is submitted this is not a jemmy which is defined in the dictionary as a " crowbar used by burglars and usually made in sections ". The Magistrate who had the advantage of seeing the weapon has made no finding in regard to it. It appears to me that an iron rod with a pointed end does not answer to the description of a jemmy. The importance of the distinction is that the burden is on the prosecution to establish that the instrument found in the possession of the accused is an instrument of house-breaking and in order to discharge that burden it would be sufficient for the prosecution to prove that the instrument is commonly used for house-breaking. Where however the instrument was ordinarily used for a purpose other than house-breaking but could also be used for house-breaking, in order to discharge the burden there should be proof that the instrument was intended to be used for house-breaking. Unlike a jemmy an iron rod with a pointed end is not primarily an instrument of house-breaking. The constable can only say that it was possible to put it to that use, and under cross-examination he says that he does not know whether it was not used for finding out the depth of soil for cultivation of vegetables. The circumstances in which the accused was arrested which I have set out earlier in this order do not lead to the irresistible inference that the accused was armed with this rod for the purpose of house-breaking. In the result this charge too must fail. The conviction and sentence of the accused is set aside and his appeal is allowed.

Appeal allowed.