[COURT OF CRIMINAL APPEAL.]

1944 *Present:* **Howard C.J., Keuneman and de Kretser JJ.**

THE KING *v.* P. A. WILLIAM PERERA *et al.*

49—M.C. Gampaha 18,370.

Evidence—Recent possession of stolen property—Presumption of theft or receiving stolen property—Presumption of fact—Evidence Ordinance, s. 114, illustration (a).

The two accused were charged with the offences, among others, of being members of an unlawful assembly the common object of which was to commit robbery and were convicted of committing offences punishable under sections 146 and 436, 146 and 333, 146 and 382 of the Penal Code.

The main evidence against the accused was that on the day after the robbery several hundred sheets of rubber, which were removed from the bungalow which was broken to, were found in the houses of the two accused. The other evidence against the accused was that of two witnesses, who deposed that on the night of the robbery they met the first accused driving a cart, in which there were several other persons and that the second accused was walking behind the cart.

Held, that the evidence in the case coupled with the failure of the accused to give evidence raised an overwhelming presumption that the accused participated in the robbery.

It is a presumption of fact dependent on the surrounding circumstances in each case as to whether the accused is guilty of receiving stolen property or of theft, and in this case, of robbery.

APPEAL against a conviction by a Judge and Jury before 2nd Western Circut, 1944.

J. E. M. Obeyesekere (with him *M. M. Kumarakulasingham*), for both appellants.—There is no direct evidence implicating the appellants. The conviction is based entirely on the discovery of some of the stolen property in their houses on the day after the robbery was committed. According to illustration (*a*) of section 114 of the Evidence Ordinance, where the possession of stolen goods is not accounted for, two inferences are possible, namely, theft or the lesser offence of receipt of stolen property. In the summing-up in this case there is no direction to the jury that when the question arises whether the presumption of the graver offence or of the lesser offence is to be drawn it is for the prosecution to establish the graver presumption rather than for the graver presumption to be drawn in the absence of an explanation from the accused. The presumption in this case is more in favour of receiving than theft. The accused have not been indicted for any offence of receiving and are therefore entitled to be acquitted. See *Emperor v. Mayadhar Pothal*[1]; *Raghunath v. Emperor*[2]; *Reg. v. Langmead*[3]; *Pratap Lohar v. Emperor*[4].

There is no proof in this case that five or more persons took part in the robbery.

[1] *(1939) A. I. R. Patna 577 at 579.*
[2] *(1925) 26 Cr. L. J. 1380 at 1383.*
[3] *(1864) 10 L. T. (N. S.) 350.*
[4] *(1936) A. I. R. Nagpur 200 at 202.*

H. W. R. Weerasooriya, C.C., for the Crown.—In a case of recent possession of stolen property it is necessary to look into the surrounding circumstances to see whether such possession is evidence of theft or dishonest receipt. The nature of the article stolen, the time within which it was discovered, the improbable or unreasonable nature of the explanation given by the accused are all to be taken into consideration. The Jury in this case have elected to convict for theft and not for receipt, and their verdict is justified by the evidence. See *Reg. v. Exall and others*[1]; *R. v. Densley and others*[2], *R. v. John Bailey*[3].

There is evidence that five or more persons took part.

M. M. Kumarakulasingham replied.

Cur. adv. vult.

August 4, 1944. HOWARD C.J.—

The two accused appeal from their convictions on a charge of being members of an unlawful assembly and as such on further charges of committing offences punishable under sections 146 and 436, 146 and 333, 146 and 380, and 146 and 382 of the Penal Code. The appeals are based on two grounds, (*a*) that it was not proved conclusively that five or more persons took part in the robbery, (*b*) that a wrong inference was drawn from the evidence that the accused took part in the robbery. In connection with ground (*a*) Mr. Obeyesekere, on behalf of the appellants, has contended that the question put by the Jury and recorded at page 25 of the Judge's charge indicated considerable confusion in their minds. The question to which Mr. Obeyesekere referred was asked by the Jury to elicit from the Judge a ruling as to what constituted participation in a gang robbery. No exception can, in our opinion, be taken to the direction given by the learned Judge in answer to this question. With regard to the number that took part in this robbery, Don Pedrick Appuhamy states that three or four persons seized him and held his hands and feet together. Also that almost immediately after he was left tied the watcher was brought and placed in the other corner of the room. He also says that the watcher must have been tied by some other people. In answer to the Court Pedrick Appuhamy also states that there were more than five people. Charles Appuhamy, the watcher, says that he was falling asleep when three persons came calling for " watcher " and got into the room occupied by Pedrick Appuhamy. That as Pedrick was tied, he was also tied in the verandah and carried into the room. Apart from the people who tied him and Pedrick there were a large number of people whom he could not identify because he was blindfolded. He also said he is certain he was being held down by three men while three or four rushed into the Kangany's room. In view of the evidence of Pedrick and Charles I do not think that there is any substance in the point that it has not been proved that five or more persons participated in this robbery.

The second ground of appeal necessitates a more detailed examination of the evidence. Pedrick and Charles both testify to the fact that about midnight on August 4, 1943, the small bungalow on the rubber estate

[1] *(1866) 176 E. R. 850.*
[2] *172 E. R. 1294.*
[3] *13 Cr. App. R. 27.*

belonging to Mr. Tudugalla was broken into by a large number of thieves. Pedrick and Charles were both tied up whilst the assailants proceeded to open boxes and rifle the bungalow. After their departure a large number of rubber sheets and other articles were found missing. Neither Pedrick nor Charles identified any of their assailants. The main evidence against the two accused was the fact that on the day after the robbery at 10.50 P.M. there was found in the house of the first accused 300 rubber sheets and two brand new Dunlop Bates tyres. The house of the second accused was searched at 11.45 P.M. and 700 diamond rubber sheets and an old torn tweed coat were found. Some of the rubber sheets, the Dunlop Bates tyres and the torn tweed coat were identified as property stolen from the house of Pedrick on the night of the robbery. No question was raised by Mr. Obeyesekere with regard to the genuineness of this identification. The only other evidence connecting the two accused with this robbery was supplied by two persons called Peter Peries and D. A. P. Suriapperuma. Peries stated that on the night of the robbery about 11 or 11.30 P.M. he was returning from Colombo when a little way from Kurunduwatta estate road he met a cart without lights. The first accused was driving the cart and there were others inside. The second accused and another man were walking behind the cart. The evidence of Suriapperuma was to the effect that he heard of the burglary about 8.30 or 9 P.M. on August 4. He made investigations and found fresh wheel tracks up to a footpath that led to the accuseds' houses. He also found a sheet of rubber in a bush. He suspected the two accused and reported the matter to Mr. Tudugalla who informed the police. The houses of the two accused were then searched. Neither accused elected to give evidence. The defence suggested that the large number of rubber sheets found in the houses of the accused had been introduced by the witness Suriapperuma and Tudugalla, to implicate the two accused. The defence even went so far as to make the fantastic suggestion that to effect this purpose the roof of the house of the first accused had been removed.

Mr. Obeyesekere takes exception to certain passages which occur in the charge of the learned Judge. At page 7 the following passage occurs:—

"Possession of stolen property soon after the commission of a theft raises the *prima facie* presumption that the possessor was either the thief or the receiver of stolen property knowing it to be stolen according to the circumstances of the case. You must take the evidence as a whole and decide whether it raises a presumption of theft or of dishonestly receiving stolen property. On this question the fact that the stolen articles were found in the houses of the accused within 24 hours of the theft has an important bearing. There was hardly any time for the articles to pass from hand to hand by normal bargain and sale. In the circumstances, you would be justified in drawing the presumption that the accused were the thieves and not receivers of stolen property. If, however, you think that the presumption of theft is not raised by the evidence but only the presumption of receiving stolen property, or if a reasonable doubt arises in your minds on that point, then it

is your duty to acquit the accused. You need not consider the case any further because there is no charge against the accused that they received stolen property."

Again at pages 14-15 there is the following passage:—

" This shows that the presumption of theft arising from the recent unexplained possession of stolen property may extend even to the manner in which the theft was committed, namely, of robbery. If you draw the presumption under section 114 (*a*) that the accused were the thieves, you will be entitled to draw the further presumption that they committed robbery. That is the meaning of that passage. There can be no doubt that the stolen articles were found in the houses of the accused soon after the theft. You will have to consider whether the accused had possession of the articles."

I would also invite attention to the following passage on pages 24-25:—

"You must ask yourselves whether this evidence is consistent with the guilt of the accused and inconsistent with any reasonable hypothesis of innocence. It seems to me that it is not. So, it is not possible for you to return a verdict against the accused upon the circumstantial evidence. The prosecution has to fall back upon a presumption raised under section 114 of the Evidence Ordinance. If you are of opinion that the accused were in possession of the rubber and that the presumption is that they were the thieves and not the receivers of stolen property, and that there was an unlawful assembly, then it will be open to you to find the accused guilty on the charges laid against them. If a reasonable doubt arises in your minds on the point, then it will be your duty to give them the benefit of the doubt and acquit them."

The passages I have cited from the charge of the learned Judge clearly indicate that he left it open to the Jury to find by their verdict on the evidence that the two accused participated in the robbery. He also indicated that the Jury might find that the accused were merely receivers of stolen property in which case they were to be acquitted. Mr. Obeyesekere contends that the Jury should have been directed that the presumption arising from section 114 (*a*) of the Evidence Ordinance was that the two accused were receivers rather than the actual thieves. We are of opinion that there is no substance in this contention. He has cited in support of this contention some Indian authorities. In one of these, *Emperor v. Pothal*[1], it was held as follows:—

" Where robbery has been committed along with murder and articles alleged to have been robbed from the body of the deceased have been discovered in the house of the accused as a result of a statement made by him to the police and the accused gives no explanation for the possession of these articles, one may presume under section 114 that the accused was either involved in the murder and robbery or at least received the stolen property knowing it to be the proceeds of the robbery. This presumption is within the terms of section 114, illustration (*a*); but when the question arises whether the presumption of the

[1] *(1939) A. I. R. Patna 577.*

graver offence or of the lesser offence is to be drawn, it is for the prosecution to establish the graver presumption rather than for the graver presumption to be drawn in the absence of an explanation from the accused."

It would appear that in *Emperor v. Pothal* the accused was a goldsmith, a person likely to be resorted to by a thief for the disposal of stolen jewels. Moreover the question which the learned Judge was considering was whether there was any evidence other than that of being in possession of property of the deceased to connect the accused with the latter's murder. In the absence of such evidence it was held that the presumption was in favour of the accused not being a participant in the murder. The same principle was formulated in *Lohar v. Emperor*[1] and *Raghunath v. Emperor*[2]. Mr. Obeyesekere also cited the case of *Reg. v. Langmead*[3]. The judgment of Blackburn J. in this case is as follows:—

"I am of the same opinion. As a proposition of law there is no presumption that recent possession points more to stealing than receiving. If a party is in possession of stolen property recently after the stealing, it lies on him to give an account of his possession, and if he fails to account for it satisfactorily, he is reasonably presumed to have come by it dishonestly; but it depends on the surrounding circumstances whether he is guilty of receiving or stealing. Whenever the circumstances are such as to render it more likely that he did not steal the property, the presumption is that he received it. In the present case I believe that the Jury have drawn the right conclusion."

The case hardly seems to bear out the contention of Mr. Obeyesekere that the presumption is more in favour of receiving than theft. This judgment seems to lay down that it is a presumption of fact dependent on the surrounding circumstances in each case as to whether the accused is guilty of receiving or stealing. This principle seems to follow from some cases cited by Mr. Weerasooriya on behalf of the Crown. In *R. V. Densley* and *others*[4] it was held as follows:—

"Stolen property being found concealed in an old engine-house, and it being watched, the prisoners were seen taking it away:—Held, that, to warrant the conviction of the prisoners, on an indictment charging them as receivers, the jury must be satisfied that the property had been stolen by some other person to the knowledge of the prisoners, and that there should be some evidence to show that such was the case:—Held, also, that the evidence given in this case would warrant a conviction for the stealing."

In *R. V. Exall and others*[5] Pollock C.B. in his charge to the Jury stated as follows:—

"And so it is of any crime to which the robbery was incident or with which it was connected, as burglary, arson, or murder. For, if the possession be evidence that the person committed the robbery,

[1] *(1936) A. I. R. Nagpur 200 at 202.*
[2] *26 Cr. L. J. of India 1380.*
[3] *10 L. T. 350.*
[4] *172 E. R. 1294.*
[5] *176 E. R. 850.*

and the person who committed the robbery committed the other crime, then it is evidence that the person in whose possession the property is found committed that other crime.

The law is, that if, recently after the commission of the crime, a person is found in possession of the stolen goods, that person is called up to account for the possession, that is, to give an explanation of it, which is not unreasonable or improbable. The strength of the presumption, which arises from such possession, is in proportion to the shortness of the interval which has elapsed. If the interval has been only an hour or two, not half a day, the presumption is so strong, that it almost amounts to proof; because the reasonable inference is, that the person must have stolen the property. In the ordinary affairs of life, it is not probable that the person could have got possession of the property in any other way. And juries can only judge of matters, with reference to their knowledge and experience of the ordinary affairs of life.

Thus, for instance (to put the present case), if the property were the produce of a burglary, then the possession of it, soon after the burglary, is some evidence that the person in whose possession it is found was a party to the burglary. For, at all events, he must have received it from one who was a party to it; and this is strong evidence that he was privy to it; and some evidence that he was a party to it. Whether or not he was so, must be judged of from all the other circumstances of the case.

If the explanation is, for instance, that the party has found the property where it might have been found, and was going to deliver it up to a constable, and the circumstances were consistent with that account, some evidence ought to be given to contradict it, and show it to be untrue.

What the jury have to consider in each case is, what is the fair inference to be drawn from all the circumstances before them, and whether they believe the account given by the prisoner is, under the circumstances, reasonable and probable, or otherwise."

The Jury in this case were invited to say whether the evidence pointed to theft rather than receiving. They have answered this question by finding that the accused participated in the robbery. In our opinion the evidence of Peries and Suriapperuma and the finding of such heavy material in the form of a large number of rubber sheets in the houses of the accused so soon after the robbery, coupled with the failure of the accused to give any explanation raised an overwhelming presumption that the latter participated in the robbery. The appeals are, therefore, dismissed.

Appeals dismissed.