1916.

Present: Wood Renton C.J. and De Sampayo J.

THE KING *v.* KIRINERIS.

353—D. C. (Crim.) Kalutara, 2,929.

Penal Code, s. 212—Taking gratification to help to recover stolen property—Burden of proof.

In a charge under section 212 of the Penal Code it is not incumbent on the prosecution to show that the accused had not used "all means in his power to cause the offender to be apprehended and convicted of the offence"; it is on the accused himself to prove affirmatively that he had.

THE facts are set out in the judgment.

Balasingham, for the accused, appellant.—There is nothing to show that the accused did not take all means in his power to cause the offender to be apprehended and convicted of the offence. The prosecution ought to have led at least some evidence to shift the burden of proof on to the accused.

The offence defined in section 212 does not consist in receiving money for helping a person to recover stolen property, but in receiving money and not taking "all means in his power to cause the offender to be apprehended," &c.

The clause beginning with "unless" does not introduce an exception, but forms part of the definition. Section 105 of the Evidence Ordinance does not therefore apply to this section. Section 106 of the Evidence Ordinance does not apply, as this is not a matter that is necessarily "a fact that is especially within the knowledge of any person," &c. But even if it were so, the prosecution should lead *prima facie* evidence. It is, for instance, not enough for the prosecution in the case contemplated in illustration (*a*) of section 106 of the Evidence Ordinance to merely prove that a person travelled by train. There ought to be proof that he had no ticket. Counsel referred to *Ratanlal, Law of Crimes, p. 291; Gour, vol. I, p. 850;* 136—D. C. (Crim.) Puttalam (August 10, 1905).

There is no proof that the bull was stolen.

Garvin, S.-G. (with him *Obeyesekere, C.C.*), for the Crown.—The clause beginning with the word "unless" introduces an exception, and it is for the accused to prove that the case falls within the exception. Counsel referred to *Rex v. Naidappu*,[1] *Ranhamy v. Banda*.[2]

Cur. adv. vult.

January 20, 1916. WOOD RENTON C.J.—

The appellant has been convicted by the District Judge of Kalutara of having received an illegal gratification from a man,

[1] *(1906) 1 A. C. R. 48.*

[2] *(1906) 3 Tam. 137.*

Podi Singho, in connection with the recovery of a stolen bull, an offence punishable under section 212 of the Penal Code, and has been sentenced to nine months' rigorous imprisonment. The appeal was argued before me in the first instance, sitting alone, on the merits. I referred it to a Bench of two Judges for the determination of a question of law, on which there had been conflicting local decisions, namely, whether in a prosecution under section 212 of the Penal Code it is incumbent on the prosecution to show that the accused has not used "all means in his power to cause the offender to be apprehended and convicted of the offence," or on the accused himself to prove affirmatively that he has done so. In 136—D. C. (Crim.) Puttalam,[1] Wendt J. held *obiter* that the *onus probandi* was on the prosecution. In *Ranhamy v. Banda*[2] Middleton J. declined to follow this authority, and ruled that the burden of proof was on the accused, and Lascelles C.J. came independently to the same conclusion in *Rex v. Naidappu*[3]

After careful consideration, I am of opinion that the two later decisions just referred to are correct. No great assistance is to be derived from the English authorities on the point, inasmuch as in the corresponding section in the English statute[4] the Legislature has made a corrupt receipt of the gratification an element in the definition of the offence; although in that statute, as in section 212 of the Penal Code, the clause which we have here to construe is introduced into the enactment by the word "unless," and, as my brother De Sampayo has shown, the requirement that the receipt should be corrupt does not involve the inclusion of disproof of the negative clause among the *facta probanda* by the prosecution. Section 212 of the Penal Code is, however, identical in its terms with section 215 of the Indian Penal Code. I have been unable to find any direct Indian authority upon the point. But both Gour[5] and Ratanlal[6] seem to regard the fact that the accused has not used all the means in his power with a view to bringing the offender to justice as one of the circumstances that have to be established by the prosecution. The structure of section 212 of the Penal Code shows, in my opinion, that the clause, "unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence," is in the nature of an exception. It is introduced, as I have already indicated, by the word "unless." It is not embodied in the portion of the section in which the offence itself is defined, but is stated as a condition on which punishment for that offence may be avoided. Under section 105 of the Evidence Ordinance the burden of bringing his case within the exception is, therefore, upon the accused. Moreover, the case is, I think, also governed by section 106 of the Evidence Ordinance: "When any fact is especially

[1] *S. C. Mins., August 10, 1905.*
[2] *(1906) 5 Tam. 137.*
[3] *(1906) 1 A. C. R. 46*
[4] *24 & 25 Vict., c. 96, s. 101.*
[5] *Vol. I., 859.*
[6] *Law of Crimes, 221.*

1916.

WOOD RENTON C.J.

The King v. Kirineris

within the knowledge of any person, the burden of proving that fact is upon him." The accused in a prosecution under section 212 of the Penal Code is the only person who is in a position adequately to supply the proof which the section requires. It was on this ground that Sir Alfred Lascelles based his judgment in *Rex v. Naidappu*.[1] It appears to me that the intention of the Legislature in section 212 of the Penal Code was to make the receipt of a gratification for the purpose of securing the recovery of stolen property illegal and punishable, unless the person who received the gratification could show that he had acted in good faith. There is, in my opinion, nothing harsh or unreasonable in an enactment of this character. The transactions with which it deals are dangerous and suspicious, and there can be no difficulty in the establishment of innocence where it in fact exists.

It remains only for me to say a word as to the facts in the present case. Although there is no direct evidence that the bull in question was stolen, both sides acted throughout on the assumption that such was the case. There is affirmative poof that the accused did not supply the complainant with the names of the thieves, and his story that the bull had been re-stolen from the thieves themselves, coupled with his desire that the headman should not be informed of the receipt of the gratification, throws a very unsatisfactory light on his conduct. He certainly did not furnish the Court with any proof that he had used "all the means in his power to cause the offenders to be apprehended and convicted of the offence." The appeal must be dismissed.

DE SAMPAYO J.—

The indictment charged the accused, under section 212 of the Penal Code, with having taken a gratification on account of helping one Patkirige Podi Singho to recover a stolen bull. That section enacts: "Whoever takes or agrees or consents to take any gratification under pretence or on account of helping any person to recover any movable property of which he shall have been deprived by any offence punishable under this Code, shall, unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence, be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

The question reserved for consideration by a Bench of two Judges is whether under a charge under the above section the prosecution must prove that the accused had not used all the means in his power to cause the offender to be apprehended and convicted, or whether the burden is on the accused of proving that he had. The answer to this question depends, in the first place, upon a further question, namely, whether the clause beginning with "unless" in

[1] *(1906) 1 A. C. R. 48.*

the above section of the Code is part of the definition of the offence, or whether it constitutes an exception. For the principle no doubt is that where any matter is part of the direct description of the offence, it should not only be alleged in the charge, but must be supported at least by *prima facie* evidence, while it is for the accused to bring himself within an exception. It seems to me that the main purpose of the entire legislation on the subject is to suppress all trafficking in crime, and therefore the above section in the first instance penalizes the mere fact of a gratification being taken to recover any property the subject of the crime, but at the same time exempts from its operation any person who shows his good faith by doing his best to carry out his undertaking. Having regard both to the form of the enactment and its object, I think that the qualifying clause under consideration states an exception which, if established, will negative the commission of the offence in a particular case. This being so, the provision of section 105 of the Evidence Ordinance, No. 14 of 1895, which only reproduces the general rule of law on this point, applies, and throws the burden of proof on the accused. This construction of section 212 of the Penal Code is supported by the decisions on analogous provisions in other local Ordinances. For instance, section 26 of the old Ordinance, No. 10 of 1844, made it an offence for any person to sell arrack by retail " without having obtained a license ....., or unless he be acting for and by authority of " a licensed retail dealer; and in *Tikiri Appuhamy v. Pedro de Silva* [1] it was held that while the absence of a license was part of the definition of the offence, and must be established by the prosecution by some evidence, however slight, the alternative provision contained in the clause prefaced by the word " unless " created an exception, the proof of which lay on the accused. Section 212 of our Penal Code, as well as the corresponding section 215 of the Indian Penal Code, is taken, with some alterations, which are not material to the present question, from the English Statute, 24 & 25 Vict., c. 96, section 101, which itself is adopted from 4 Geo. I., c. 11, section 4, and I may note that Archbold's *Criminal Pleadings* (*ed. XIX, p. 897*), while the form of the indictment there given contains the negative matter, states the necessary evidence to be (1) that the goods were stolen, and (2) that the accused received the money upon the pretence or account stated in the indictment, and no mention is made of the necessity to prove the negative matter.

I also think that the burden of proof is on the accused for another reason. Under the English common law it is a matter of some controversy as to the extent of the rule that, if a negative averment is made by one party which is peculiarly within the knowledge of the other, the party who asserts the affirmative must prove it, and not he who asserts the negative. *Rex v. Turner* [2] and *Elkin v.*

[1] (1879) *4 S. C. C. 126.*

[2] *5 M. & W. 206*

1916.

DE SAMPAYO J.

The King v. Kirineris

Janson [1] may be cited as illustrative of the opposite views. But section 106 of our Evidence Ordinance, No. 14 of 1895, puts the matter definitely as follows: "When any fact is especially within the knowledge of any person, the burden of proving the fact is upon him." The illustration (*b*) of that section, with regard to a charge of travelling on a railway without a ticket, more than justifies our holding that, in a case under section 212 of the Penal Code, the burden of proving that the accused had used all the means in his power to cause the offender to be apprehended and convicted of the offence is on the accused himself, and that it is not incumbent on the prosecutor in the first instance to prove the contrary.

Accordingly I agree that *Ranhamy v. Banda*[2] and *Rex v. Naidappu*[3] lay down the correct ruling on this point.

Appeal dismissed.