1960 *Present :* **Sinnetamby, J., and L. B. de Silva, J.**

THE QUEEN *v.* D. L. ALBERT

S. C. 117/60—D. C. (Criminal) Panadura, 295/25103

Evidence Ordinance—Section 27 (1)—Meaning and effect of the words "as related distinctly to the fact thereby discovered"—Penal Code ss. 369, 394, 443.

The accused-appellant was convicted of house-breaking by night and retention of stolen property, offences under sections 443 and 394 of the Penal Code. The stolen goods were discovered by a Police Inspector in consequence of a statement made to him by the accused when he was in custody. In his evidence-in-chief at the trial the Inspector answered in the affirmative the question : "Did the accused tell you that the articles that were subsequently recovered by you were in his custody and thereafter take you and point them out to you ?".

Held, that the evidence of the statement of the accused to the police officer was not admissible under section 27 (1) of the Evidence Ordinance. The words "the property is in my custody" in the statement of the accused were not directly relevant to the discovery of the stolen goods nor could they be said to relate distinctly to their discovery within the meaning of section 27 (1) of the Evidence Ordinance.

APPEAL from a judgment of the District Court, Panadura.

Colvin R. de Silva, with *Y. L. M. Mansoor*, for the Accused-Appellant.

S. S. Wijesinha, Crown Counsel, for the Crown.

Cur. adv. vult.

November 14, 1960. L. B. DE SILVA, J.—

The Accused-Appellant was indicted on three counts of house-breaking by night, theft of articles and cash worth Rs. 4803·75 cts. and dishonestly retaining stolen property worth Rs. 160.50 cts. belonging to Mrs. S. P. Suripperuma, punishable under sections 443, 369 and 394 of the Penal Code respectively.

After trial the learned District Judge convicted the Appellant on the 1st and 3rd counts but acquitted him on the 2nd count of committing theft.

The house of Mrs. Suripperuma was burgled on the night of 10.3.59 and cash, jewellery and other articles wore stolen from her house. The burglars were not identified by the inmates of the house.

On information received by the Police, Inspector Mendis searched the premises of the Accused about 3.40 a.m. on 16/3/59. On a statement made by him, the Inspector discovered three bangles, one ear stud and

some coins valued at Rs. 160·50 in a cart shed in the compound of the accused and some distance away from his kitchen. They were in a tin which was kept on a plank about 6 feet from the ground.

The bangles and the ear stud (one) were identified by Mrs. Suripperuma as part of her stolen property. These articles were not included in the first list of stolen property (P1) given by her to the Police but had been included in a second list furnished by her on the same day as the first list.

In the course of his evidence, the Inspector was asked—

Q. Did the Accused tell you that the articles that were subsequently recovered by you were in his custody and thereafter take you and point them out to you ?

Counsel for the defence objected to this question as inadmissible but the learned Judge allowed the evidence under section 27 of the Evidence Ordinance. He relied on the case reported in 51 N. L. R. at p. 529.

The Inspector answered " Yes " to the question.

The conviction of the accused was based solely on the finding that part of the stolen property was found in the possession of the accused soon after the theft and the presumption drawn by the Judge under section 114 (*a*) of the Evidence Ordinance.

In his judgment the learned District Judge has made no reference to the confession by the Accused that the stolen property was in his custody. He has stated in the judgment " Within five days of this occurrence these articles or some of them are found in the possession of the accused in the house in which he lives at 4 a.m. in the morning ".

The vital question for consideration in this case is whether the evidence of the Inspector of Police that the Accused told him that these articles which were subsequently identified as part of the stolen property, were in his custody, is admissible as evidence under section 27. There is no question that this statement is a confession. A confession to a Police Officer may be admitted in evidence if it falls within the provisions of Section 27 of the Evidence Ordinance.

Under this section, when a fact is discovered in consequence of information received from a person accused of any offence, in the custody of a Police Officer, " so much of such information, whether it amounts to a confession or not, as relates *distinctly* to the fact thereby discovered, may be proved ".

The Courts have laid special emphasis on the word " *distinctly* " in this section. Otherwise the door will be thrown wide open to admit a number of confessions which did not directly relate to the discovery of such fact.

In *Fernando v. S. I. Police, Slave Island* [1], a stolen bicycle was recovered on a statement to the Police. It was elicited in the cross-examination of a Police Officer that the Accused stated that he had stolen a cycle at the City Dispensary and had later sold it to a carter.

It was held that the statement that he had stolen the cycle, did not relate distinctly to the discovery of the cycle.

In an Indian Case—*Amiruddin v. Emperor* [2]—it was held by Shamsul Huda J. at Page 93 that " If, therefore, an accused person were to state to a Police Officer that he killed A with a knife and concealed the dead body at a particular place, all that is admissible is the information that he had concealed the dead body in that place but the further information that he himself had killed A is not admissible under section 27 ".

It was also held in *Queen Emperor v. Babu Lal* [3] by Staight J. " Where a statement is being detailed by a Constable as having been made by an accused in consequence of which he discovered a certain fact or facts, the strictest precision should be enjoined on the witness so that there may be no room for mistakes or misunderstanding ".

We have referred to this Allahabad Case as it appears to us that the Inspector of Police has paraphrased the statement of the Accused and not given the actual words used by him. It appears to be very desirable, almost necessary, that the actual words used by the accused which led to the discovery of the relevant fact, should be disclosed in the evidence of the Police Officer. That would help the Court to a great extent in deciding whether the statement related *distinctly* to the fact thereby discovered.

In the case of *Rex v. Jinadasa* [4], the accused had told the Police Sergeant " I can point out the place where I threw it " meaning the Katty that was subsequently discovered. The Accused took the Police to the spot where he had thrown it. This evidence was admitted.

In the present case, the statement of the accused that the property which was subsequently recovered, was in his custody, could not be said to have been distinctly related to the discovery of that property. The property may well have been kept anywhere but still be in his custody. He may very well have said something further before he took the Police to the Cart Shed where the property was found. He may have said " I have kept the property or hidden the property in the Cart Shed " or " I can point out the place where I kept them or hid them " or words to that effect.

In this context the words " the property is in my custody " are not directly relevant to the discovery nor could they be said to relate distinctly to the discovery.

We are handicapped in this case as the very words used by the accused do not appear to be given by the Inspector in his evidence. If as a result any reasonable doubt arises in our minds as to the admissibility of such evidence, the Accused is entitled to the benefit of such doubt.

[1] *(1945) 46 N. L. R. 158.*
[2] *A. I. R. (1918) Calcutta— I. L. R. 45 Calcutta page 88.*
[3] *(1884) 6 Allahabad 509.*
[4] *(1950) 51 N. L. R. 529.*

In this case, a reasonable doubt arises in our minds, as to the admissibility of the evidence and we therefore hold that the evidence is inadmissible.

It would be a question of fact in each case if the statement *distinctly* related to the fact thereby discovered, keeping in mind the significance given to the word "*distinctly*". It may be pointed out that the learned District Judge has not referred at all to the confession of the accused to the Inspector of Police that the property (later identified as part of the stolen property) was in his custody. The learned Judge has also misdirected himself in the judgment by stating that the stolen property was found in the possession of the Accused in the house in wnich he lives. The property was in fact found in a Cart Shed and the Inspector has stated in evidence that he did not know if this Shed belonged to the accused though he had stated earlier that it was in the compound of the accused.

The learned Crown Counsel argued that even if the statement of the accused to the Police Inspector was excluded, it may be inferred from the evidence that the stolen property was in the possession of the accused as he pointed out the place where the property was kept.

This submission is covered by authority. In *Edwin Singho v. Inspector of Police, Chilaw*[1] Gratiaen J. held, "It seems to me that, giving full effect to the appellant's alleged admission that he knew where the skin of the stolen goat was buried, this admission falls short of proof that he himself had at any time possessed the skin before the burial took place". (Vide also the case reported at 44 C. L. W. 42.)

We hold in this case that the Crown has failed to prove that the stolen property which was recovered by the Police in the Cart Shed, was in the possession of the accused and no presumption can be drawn against him under Sec. 114 of the Evidence Ordinance.

We also wish to point out that in this case, the learned District Judge acquitted the accused on the charge of theft but convicted him on the charges of house breaking and retaining stolen property. If the learned Judge had convicted the accused of the theft, acting under the presumption drawn from Section 114 of the Evidence Ordinance, he was fully justified in convicting him of the house-breaking as well because the theft was committed in the course of the house-breaking. But it is illogical to acquit him of the charge of theft but convict him only of retaining stolen property and thereafter proceed to convict him of the house-breaking because the property has been stolen as a consequence of the house-breaking. We appreciate the difficulty in which the learned District Judge was placed in this case as the charge of theft as set out in Count 2 of the Indictment did not include the property discovered in the Cart Shed near Accused's house. But this defect in the Indictment does not justify the course he has taken.

[1] *46 C. L. W. 52 at page 53.*

It is not necessary to deal with the other points raised by the learned Counsel for the Appellant in this case as the questions that we have dealt with, go to the root of this case. For these reasons, we have allowed this appeal and acquitted the accused.

SINNETAMBY, J.—I agree.

Appeal allowed.