1943.

Present : **Wijeyewardene J.**

CASSIM, Appellant, *and* UDAYAR, MANAAR, Respondent.

397—M. C. Mannar, 2,788.

Evidence Ordinance—Presumption under section 114 (a)—Presumption of fact and not of law—Duty of Court.

The presumption arising under section 114 (*a*) of the Evidence Ordinance is a presumption of fact, in the nature of a maxim, and the Court has to consider carefully whether the maxim applies to the facts of the case before it.

The presumption is not confined to cases of theft.

APPEAL from a conviction by the Magistrate of Mannar.

J. E. M. Obeyesekere, for the accused, appellant.

G. P. A. Silva, C.C., for the respondent.

Cur. adv. vult.

July 30, 1943. WIJEYEWARDENE J.—

The accused-appellant was charged with (*a*) housebreaking by night (section 443 of the Penal Code) and (*b*) theft (section 369) or in the alternative dishonest retention of stolen property (section 394). He was convicted under sections 443 and 369 and sentenced to rigorous imprisonment for two consecutive periods of six months.

In the course of a well considered judgment the Magistrate has analysed the evidence carefully and reached the decision that the goods found in the possession of the accused at Anuradhapura on January 14, 1943, were some of the goods stolen from a house in Mannar which was burgled

[1] *10 N. L. R. 183.* [2] *7 N. L. R. 96.*

eight days earlier and that the accused knew that they were stolen property. I do not think it necessary to refer to the evidence in detail as I am in entire agreement with the learned Magistrate with regard to the findings.

The conviction of the accused on the charges of housebreaking and theft is based upon those findings of facts. It is no doubt open to a Court to draw such an inference of guilt under section 114 of the Evidence Ordinance as stated in the following passage in *Taylor on Evidence* (*12th ed., para. 142*).

"The presumption is not confined to cases of theft but applies to all crimes even the most penal. Thus on an indictment for arson proof that property which was in the house at the time it was burnt, was soon afterwards found in the possession of the prisoner has been held to raise a probable presumption that he was present and concerned in the offence. A like inference has been raised in the case of murder accompanied by robbery, in the case of burglary and in the case of the possession of a quantity of counterfeit money."

The presumption arising under section 114 of the Evidence Ordinance is not, however a presumption of law but a presumption of fact "in the nature of a mere maxim", and the Court has to consider carefully whether the maxim applies to the facts of the case before it.

The accused is a hawker of goods and there is no evidence whatever to show that he was seen near the burgled house or even in Mannar at or about the time of the burglary. I do not think it safe in the circumstances of this case to base a conviction for housebreaking and theft on the isolated fact of the retention of stolen property, eight days later.

I set aside the conviction under sections 443 and 369 and convict under section 394 and sentence the accused to rigorous imprisonment for six months.

Conviction varied.