SOMARATNE
v.
THE ATTORNEY-GENERAL

COURT OF APPEAL.
MOONEMALLE, J. AND JAYALATH, J.
C.A. (S.C.) 13/79–D.C. GALLE 16470.
JULY 3, 1985.

Criminal Law–Housebreaking and theft, s. 443 and s. 369 of the Penal Code–Retention of stolen property, s. 394 of the Penal Code–Common intention–Evidence Ordinance, section 114 (a).

Where the only evidence against the appellant who had been convicted along with another of house-breaking and theft by breaking into a textile store and stealing textiles was that he was the driver of the lorry in which the stolen textiles were transported and his explanation was that on the instructions of one Mawjoor Mudalali in whose garage the lorry (owned by one Miskin) was parked he had driven it to Galle from Colombo with two unknown persons and on their directions parked it near a store and while he slept at his seat, textiles had been loaded into it and thereafter he had driven back to Saunders Place, Pettah at which point the detection was made and he was taken into custody.

Held–

(1) There was no evidence that the appellant entered the store building at Galle and therefore the conviction of house-breaking under s. 443 of the Penal Code cannot be sustained.

(2) As the appellant did not enter the building he could not be convicted of theft from a building used for the custody of property under s. 369 of the Penal Code.

(3) The conviction of the appellant on the basis of his having entertained a common intention along with the other accused cannot stand as the Judge had failed to discuss this rule and apply it to the facts of the case. The prosecution must prove the essentials ingredients of common intention namely a sharing of a common intention and participation in the commission of the offences.

(4) Under s. 114(a) of the Evidence Ordinance the Court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession. As the presumption arising under s. 114 (a) of the Evidence Ordinance is a presumption of fact in the nature of a mere maxim, it is the duty of the trial Judge to consider carefully whether the maxim applied to the facts of the case before him.

Where the prosecution relies on circumstantial evidence for common intention then the principle is that the inference of common intention should not be reached unless it is a necessary inference, an only inference, an inference from which there is no escape. Failure to apply these tests will make the conviction on the inference that the appellant had acted in futherance of a common intention unsustainable.

It is the duty of the trial Judge to consider whether the explanation given by the appellant was reasonably true and if so, even though the trial Judge is not convinced of its truth, the appellant is entitled to be acquitted.

Case referred to:

Cassim v. Udayar Manaar (1943) 44 NLR 519.

APPEAL from judgment of the District Court of Galle.

Dr. Colvin R. de Silva, with *Mrs. Manori Muththetuwegama, Bimal Rajapakse*, and *Miss Saumya de Silva* for 2nd accused-appellant.

R. Arasakularatne, S. S. C. for Attorney-General.

Cur. adv. vult.

August 8, 1985.

MOONEMALLE, J.

At the trial there were four accused. The indictment contained the following three charges:–

(1) That the four accused did on or about 11th March 1971 commit house-breaking by entering into the building of the Hirimbura Textile Co-operative Society with the intent to commit theft, and thereby committed an offence punishable under section 443 of the Penal Code.

(2) That at the same time and place and in the course of the same transaction these accused did commit theft of cloth valued at Rs. 200,000 from the possession of W. Weerasuriya of the Hirimbura Textile Co-operative Society and thereby committed an offence punishable under section 369 of the Penal Code.

(3) That on the same day and in the course of the same transaction at Pettah, Colombo, the first and second accused did dishonestly retain stolen property to the value of Rs. 129,163.30 cts., to wit cloth stolen from the possession of the said W. Weerasuriya, knowing or having reason to believe the same to be stolen property, and thereby committed an offence punishable under section 394 of the Penal Code.

After trial, the 1st and 2nd accused were found guilty on counts 1 and 2, and the trial Judge did not come to a finding on count 3 as he had convicted the two accused on counts 1 and 2. The 3rd and 4th accused were acquitted on counts 1 and 2. The 1st and 2nd accused were each sentenced to 5 years' R.I. on count 1, and to 18 months' R.I. and a fine of Rs. 100 in default 2 weeks' R.I. on count 2, the sentences to run concurrently. The 1st accused did not appeal from these convictions and sentences. It is only the 2nd accused who has appealed. There are two incidents which took place in this case. The first was at the Hirimbura Textile Co-operative Society, Galle and the second at Saunder's Place, Pettah. There were three watchers attached to he Hirimbura Textile Co-operative Society, Galle. The watcher on duty on the night of 11.3.1971 was Dias. He had taken up duties that nigt at 10 p.m. When he was on his rounds at the rear of the building, about 2 a.m. four persons came up to him. One was armed with a revolver and another with a knife. The knife and revolver were placed against his chest and he was threatened not to shout. Then one of them put a piece of cloth into Dias's mouth and covered his face with a cloth and tied it up. Thereafter, Dias's legs were tied together and he was carried and placed on a bench and tied up there. About five minutes later he heard the doors of the stores being forced open. Dias stated that the 1st, 3rd and 4th accused were among these four persons. The 1st accused had pressed the revolver against his chest. One of the four had sat on top of his legs when he was tied to the bench. He had not shouted out till they had left the place.

Josinahamy who was the mother of one of the watchers stated that about 3.30 a.m. that day a Muslim person had come to her house and had told her that her son was "finished", meaning that he was dead. She then went to the spot. It was very dark at the time and she proceeded towards the watcher's quarters. There she found a person groaning. She removed the cloth with which Dias was covered and spoke to him and then she realized that he was not her son. She had then informed Panditha, the Chairman of the Society who had come to the place and found the watcher Dias tied to a bench. Then he had informed the Galle police. It was after the police arrived at the scene that Dias was released. This was the incident that occurred at Galle.

On 11.3.1971, Inspector Fonseka who was then P. S. 6564 and was attached to the Pettah police station, had been returning to the station after checking on an information, when about 8.35 a.m. when

he reached Saunder's place, he saw a lorry halted. Then when he was coming in the direction of the lorry, he noticed some children who were near the lorry taking to their heels. He got suspicious and went up to the lorry and found the 2nd accused in the driver's seat and the 1st accused seated next to the 2nd accused. The lorry contained textiles. He had questioned both accused and as they did not give a satisfactory explanation, he had the lorry driven to the Pettah police station. The lorry contained verties, small bed sheets and sarees, a motor and two table lamps. A revolver was found somewhere behind the driver's seat. After the accused were questioned, the Galle police were notified. Some officers from the Galle police station along with the storekeeper, Wimalasiri, the Accountant Weerasuriya and Dias all of the Hirimbura Textile Co-operative Society came to the Pettah police station. The productions except the revolver which were found inside the lorry were identified as property of the Hirimbura Textile Co-operative Society. The 1st accused did not give evidence. The 2nd accused in his evidence stated that he was the driver of the lorry and his employer was one Mawjoor Mudalali. The owner of the lorry was one Miskin. The lorry was kept at Mawjoor's garage at Prince of Wales Avenue, Colombo. On 10.3.71 about 4 or 5 p.m., Mawjoor had told him to take the lorry to Galle. At that time there were two persons unknown to him who were in the lorry and he was asked to go to Galle with them. He set out for Galle in the lorry with these two about 6 - 6.30 p.m. they arrived at Galle after midnight and he did not know very much about the roads there. He was directed by the other two, about 1 or 2 a.m. he had halted the lorry near a store. The two persons in the lorry had got down there. Then cloth goods were loaded into the lorry while the 2nd accused slept in his seat. After the loading was completed, the 1st accused had got into the lorry and the 2nd accused drove the lorry back to Colombo. The lorry was halted at Saunder's Place, Pettah when they were taken into police custody. The learned District Judge rejected the evidence of Dias regarding his identity of the 1st, 3rd and 4th accused that night. He also did not act on the results of the identification parade due to certain infirmities in the holding of the parade. There is no doubt that the goods found in the lorry were identified as those stolen from the Hirimbura Textile Co-operative Society, and that at the time the 1st and 2nd accused were arrested those stolen goods were in the lorry in which the two accused were. Dr. Colvin R. de Silva who appeared for the 2nd

accused-appellant conceded that the goods found in the lorry were established as being goods stolen from Hirimbura Textile Co-operative Society. However, Dr. de Silva submitted that there was no evidence that the 2nd accused had entered the building of the Co-operative Society from where the goods were stolen. He submitted that the 2nd accused had been asleep on his seat in the lorry at the time of the loading. He submitted that the 2nd accused could not therefore be found guilty of the offences of housebreaking and theft.

Dr. de Silva further drew our attention to section 369 of the Penal Code under which section the 2nd accused was found guilty on count 2. According to section 369 the theft had to be committed in any building used for the custody of property. He submitted that as there was no evidence that the 2nd accused entered the Society building there was no material on which to convict the 2nd accused for the offence of theft under section 369. He further submitted that the learned trial Judge had convicted the 2nd accused on both counts 1 and 2 for offences of house-breaking and theft on the basis that he entertained a common intention along with the 1st accused to commit these offences. He submitted that the learned trial Judge had failed to discuss the rule of common intention and apply that rule to the facts of the case. Therefore Dr. de Silva submitted that the convictions and sentences against the 2nd accused on counts 1 and 2 could not be sustained.

Senior State Counsel conceded that he could not support the conviction of the 2nd accused on the charge of housebreaking, but, he submitted that the conviction of the 2nd accused on the charge of theft should stand. He relied on section 114 (*a*) of the Evidence Ordinance under which the Court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession. Where offences such as housebreaking and theft are alleged to be committed in furtherance of a common intention, it is necessary for the prosecution to prove two essential ingredients, namely, a sharing of a common intention by the accused and participation of the accused in the commission of those offences. It was necessary for the trial Judge to apply the rule of common intention to the facts of the case. Where the evidence before the trial Judge was circumstantial, then it was his duty to pay heed to the principle that the inference of common intention should not be

reached unless it is a necessary inference, an only inference, an inference from which there is no escape. The learned trial Judge has been silent on all these important factors relating to the rule of common intention. He should have considered them along with the evidence in the case which he should have carefully analysed before coming to any finding on the question whether the 2nd accused acted in furtherance of a common intention with the other accused to commit the offences of housebreaking and theft. I agree with Dr. Silva that the conviction of the 2nd accused on the charges of housebreaking and theft on the basis that these offences were committed in furtherance of a common intention cannot stand.

It has been established that the goods found in the lorry are stolen goods, and that the 1st and 2nd accused were in the lorry in which the stolen goods were at the time of detection by P. S. Fonseka, and it has been established that these goods were detected in the lorry *soon after* the theft. The burden is on the prosecution to prove that the 2nd accused was in possession of these stolen goods. If it is proved that the 2nd accused was in possession of these stolen goods, then in the circumstances of this case, he will be presumed to be the thief, or to have received the goods knowing them to be stolen unless he can account for his possession.

From the mere fact that the 2nd accused was in the lorry at the time of the detection, it does not necessarily follow that he was in possession of the stolen goods. He was not alone in the lorry. The question arises in whose possession were the stolen goods. The 1st accused has given no explanation in court regarding the possession of these goods. In fact he gave no evidence at all. On the other hand, the 2nd accused gave sworn evidence and has given an explanation as to how these goods came to be in his lorry.

As the presumption arising under section 114(*a*) of the Evidence Ordinance is a presumption of fact in the nature of a mere maxim, it is the duty of the trial Judge to consider carefully whether the maxim applied to the facts of the case before it. *Cassim v. Udayar Manaar* (1).

It was the duty of the trial Judge to have considered whether the explanation given by the 2nd accused was reasonably true. The learned trial Judge when considering the case of the 1st and 2nd accused referred to the evidence of P. S. Fonseka who stated that he

questioned these two accused and that they did not give a satisfactory explanation. This evidence is not relevant. The question whether the accused gave a satisfactory explanation or not is a matter for the court to decide. He referred to the evidence of Miskin the owner of the lorry where he had stated that he did not give permission for the lorry to be taken that day. But the fact is that Miskin is not the 2nd accused's employer, and the 2nd accused does not get directions from Miskin. The 2nd accused's employer is Mawjoor, who is the son-in-law of Miskin. Miskin himself testified to the fact that it was his son-in-law who paid the 2nd accused's salary. According to the 2nd accused, he drove this lorry to Galle, that day on instructions of Mawjoor. Thus, no adverse inference could be drawn against the 2nd accused because Miskin had not given permission for the lorry to be taken from the garage.

Learned Senior State Counsel submitted that the 2nd accused did not call Mawjoor to support his story. It might very well be that the 2nd accused thought that it was not likely that Mawjoor would support his story fearing that he himself may be implicated, as the stolen property was found in the lorry which he sent to Galle with his driver. In my view, allowance must be given to the 2nd accused for any reluctance on his part to call Mawjoor. The trial Judge should have carefully analysed the evidence before coming to a finding as to who was in actual possession of the stolen goods. According to the 2nd accused he was the mere driver of this lorry and he was carrying out the instructions of his master to drive the lorry to Galle with the two persons given to him. The 2nd accused had slept on his seat in the lorry while the loading took place. This is normal conduct of a lorry driver. A lorry driver never assists in loading a lorry. The loading is done by labourers. One of the reasons, the learned trial Judge did not act on the 2nd accused's evidence was because the 2nd accused had stated that when he had stopped the lorry near the Stores and remained in his seat during the loading, that he neither heard anything nor saw anything, while the watcher Dias stated that he had shouted out when he lay tied on to the bench. The learned trial Judge did not address his mind to the fact that Dias at no stage of the incident spoke of hearing a lorry coming into the premises. In fact, he did not speak to hearing the sound of any lorry at any stage. It may very well be that when the lorry did arrive and leave, Dias was either fast asleep or had

been left tied on to the bench in another part of the premises from where his shouts could not have been heard to the lorry nor could he have been seen from the driving seat of the lorry. The place where he had been tied up may have been dark when the lorry arrived According to Josinahamy when she went to these premises about 3.30 a.m. it was very dark and she found Dias tied to a bench in the watcher's quarters. The learned trial Judge when considering the evidence of the 2nd accused should have paid heed to the fact that the 2nd accused was neither identified at the scene by Dias nor was he identified at the identification parade. This supports his version that he did not get down from the lorry but slept in his seat. These are matters which are favourable to the 2nd accused the benefit of which he is entitled to. Instead, however, the learned trial Judge misdirected himself when in his judgment he referred to Dias having identified all four accused that night when in fact he had not identified the 2nd accused. This may well have clouded his judgment. The learned trial Judge has failed to analyse the evidence carefully and he has not considered whether the explanation given by the 2nd accused was reasonably true. Instead, he has at the end of his judgment concluded that on the evidence that it has been proved beyond reasonable doubt that the 1st and 2nd accused had committed the offences of housebreaking and theft in furtherance of a common intention to commit those offences.

Even though the learned trial Judge was not convinced of the truth of the 2nd accused's version, still it was his duty to consider whether his version was reasonably true. Because if the explanation given by the 2nd accused might reasonably be true, although the learned trial Judge is not convinced of its truth, the 2nd accused is entitled to an acquittal. Had the learned trial Judge carefully considered the totality of the evidence led in the case, I think he may have arrived at a finding that the explanation of the 2nd accused is reasonably true.

For these reasons, I set aside the convictions and sentences entered against the 2nd accused and I acquit him on counts 1 and 2. The appeal is allowed.

Appeal allowed and appellant acquitted.