ALAGARATNAM AND OTHERS
v.
THE REPUBLIC OF SRI LANKA

COURT OF APPEAL.
G. P. S. DE SILVA, J. AND BANDARANAYAKE, J.
C. A. 285-87/81 – M. C. BANDARAWELA 30913.
OCTOBER 15, 1985.

Criminal Law – Theft, s. 370 of the Penal Code – Joint possession – Common intention – Conviction for theft and retention of stolen property.

Where the facts were that the three accused were found in a lorry loaded with stolen tea, driven by the 1st accused soon after some unidentified men had been seen loading the lorry with the stolen tea in bags.

Held –

(1). Although it is possible that it was not the accused but others who had loaded the tea into the lorry and therefore that the accused had not dishonestly 'moved' the tea still by applying the provisions of s. 114 of the Evidence Ordinance in the absence of any explanation they could be found guilty of theft.

(2) The question of joint possession must be determined on the facts and circumstances of each case.

(3) The 1st accused's explanation that he was taking the 3rd accused who was suffering from heart disease for treatment was rightly rejected as the three accused would have seen the tea being loaded and the 3rd accused had disappeared from the scene. Hence the presence of the 1st accused and 3rd accused was a participatory presence.

(4) The facts also support the inference of joint and exclusive possession and a pre-arranged plan and accordingly action in furtherance of a common intention by the accused.

(5) Once a person is convicted of theft he cannot also be found guilty of retention of stolen property. Receiving or retaining stolen property is a separate offence and a thief cannot at the same time be a receiver of stolen goods.

Case referred to:

(1) *Khan v. Kanapathy (1937) 9CLW 21.*

APPEAL from judgment of the Magistrate's Court of Bandarawela.

Ranjith Abeysuriya with *Javid Yusuf* and *Neville Abeyratne* for 2nd, 3rd and 4th accused-appellants.

S. J. Goonesekera, S.C. for State.

Cur. adv. vult.

November 29, 1985.

BANDARANAYAKE, J.

Seven persons were charged with the theft of 471 Kilos of tea valued at Rs. 9,420 an offence punishable under s.370 of the Penal Code. Alternatively they were charged with retention of the said stolen property. At the trial the 5th, 6th and 7th accused were discharged. The 1st to 4th accused were convicted on both counts. The 1st accused has not appealed. This appeal is by the 2nd, 3rd and 4th accused in the case.

The tea was alleged to have been stolen from the tea factory of Demodera Estate. The prosecution led evidence that Lingam, the Factory Supervisor who lived close by was awakened by the barking of dogs. It was about 11 p.m. on a Poya holiday. He investigated and saw a light burning in the factory and a lorry parked in the factory compound. He saw two persons loading bundles brought out of the stores into the lorry. He did not identify them. He alerted Samarakkody, another employee who lived close by. After loading the

lorry started and proceeded and when it came along the road near the witnesses, Samarakkody challenged it and the lorry was stopped. The 1st accused was the driver. The 3rd accused was occupying the front passenger seat. The 2nd and 4th accused were in the rear of the lorry with 11 gunnies full of tea. Samarakkody questioned the driver and the 1st accused said he was taking the 3rd accused to hospital as he complained of heart trouble. Samarakkody took the switch key from the lorry and began to deflate a tyre. The 2nd accused thereupon came up to him and said "සමරේ ඔක තතර කරන්න." The management was informed. By the time they came to the scene the 2nd, 3rd and 4th accused had left.

At the close of the prosecution case the 5th to 7th accused were acquitted. The 1st accused testified on his own behalf. He admitted driving the lorry, and that bags of tea were found in it when apprehended. He admitted that the 2nd, 3rd and 4th accused were in the lorry at the time. He however sought to avoid culpability by asserting that he did not voluntarily drive the vehicle but acted under compulsion on the orders of the discharged 5th accused to take the 3rd accused to hospital. He knew the 3rd accused was suffering from a heart ailment. He had taken sick people to hospital before in the lorry. He saw some persons load gunnies from the factory into the lorry. He realised what was happening and he walked away but had to return. He saw the 2nd and 4th accused standing in front of the lorry and at the entrance to the tea stores from where the bags were being brought and loaded into the lorry. Later they too got into the lorry.

That the tea found in the lorry was stolen property was not contested in appeal. This aspect of the case has been carefully considered by the Trial Judge. It was however contended by Counsel for the appellants that there was no direct evidence that any of these appellants 'moved' the tea from the factory into the lorry or did any act regarding the stolen property. They were in the lorry with 11 bags of tea. There was no evidence that the 2nd, 3rd and 4th accused were in control of the journey. It was the evidence of the 1st accused that it was the discharged 5th accused who arranged the journey. Certain unidentified persons were seen carrying bags from the factory to the lorry both by Lingam and Samarakkody and by the 1st accused. It is reasonably possible therefore that persons other than the appellants dishonestly 'moved' the property. In this state of the evidence the trial

Judge has first held that the appellants and the 1st accused were in joint, conscious and exclusive possession of the property and thereafter, in the absence of an explanation by the appellants presumed they were the thieves purportedly applying the provisions of s.114 of the Evidence Ordinance and convicted them of theft on count 1. On the same conclusion of joint possession the appellants have been convicted of retention of stolen property on Count 2.

It was the submission of appellants' Counsel that there was insufficient evidence from which a conclusion of joint exclusive possession could be reached attributable to all the appellants. Counsel relied on the case of *Khan v. Kanapathy* (1), where the carcasses of stolen goats were found in a car in which seven persons were travelling including the owner and driver. The five accused were in the rear. The Magistrate convicted the accused. It was held in appeal that the evidence was insufficient to attribute joint possession to the accused. This case can be distinguished. The Magistrate had given no reasons for his conclusion. The owner and driver were not charged although they were in the car. So, the person in charge of the journey would have been the owner. Again, the car was stopped by the Police somewhere along the journey. There was no evidence that the five accused were in the car at the time the stolen property was put into the car. They may well have got in somewhere along the way and thus have no connection whatever with the stolen property. In such circumstances mere knowledge of the fact that carcasses of goats were in the car was not sufficient to connect the accused with the stolen property.

The question of joint possession must be determined on the facts and circumstances of each case. This was a Poya day holiday when the factory was not working. It was 11 p.m. The lorry was parked within the factory premises. Persons were seen stealing tea from the factory and loading it into the lorry. The 1st accused testified to the effect that the 2nd and 4th accused were standing near the lorry and near an entrance to the stores at the time. They could therefore have seen what was going on. The Magistrate has examined the 1st accused's evidence with caution bearing in mind that he was an accomplice. He has looked for corroboration. In fact the 1st accused is corroborated on a number of material particulars by the two witnesses for the prosecution. The only point on which he is not corroborated is where he says that the 2nd and 4th accused were standing near the lorry and near the stores entrance. They were in the

lorry when it was apprehended just outside the factory gate at the commencement of the journey. The Magistrate has accepted this evidence as reliable although he rejects the 1st accused's defence of involuntary participation–compelled to take the sick 3rd accused to hospital along with the stolen tea. The supposed heart patient, the 3rd accused, had disappeared from the scene when the authorities arrived. It is unlikely that he was a person who needed immediate attention by hospitalisation to save his life. Upon the facts and circumstances the Magistrate was well entitled to reject the 1st accused's exculpatory plea. It is open to the trier of fact to attach different degrees of credit to the testimony of a witness. It is also significant that the appellants were all persons having connection with the tea factory. The connection could facilitate the commission of the offence. The 2nd accused was the senior assistant factory officer. The 3rd accused was the tea maker. The 4th accused was a factory inspector under interdiction. Again there is the appellants' conduct in that when the estate management got to the scene the appellants were missing. The 2nd accused-appellant had also requested witness Samarakkody to let the lorry proceed without hindrance.

In the background of these circumstances, I am of the view that the presence of the appellants in the lorry so soon after the theft with the 11 bundles of tea stolen from the factory amounts to a 'participatory presence. The direct evidence is that the appellants witnessed the theft. Their presence with the stolen property so close to the scene so soon after a theft overwhelmingly suggests conscious joint exclusive possession of the stolen articles. I reject the submission of appellant's Counsel that their presence was a 'mere presence' from which possession could not be inferred in the absence of an explanation.

Counsel also argued that in any event, before an inference of theft could be drawn against all the appellants, there must be satisfactory evidence that the appellants together with the 1st accused shared a common intention to steal tea.There was no satisfactory evidence in this regard. Mere presence does not constitute evidence per se of common intention.

The circumstances of this case as set out point unerringly to the inference that there was a pre-arranged plan to steal tea on this night. Upon the circumstances therefore it is a necessary inference that the appellants and the 1st accused came together at the factory at this time for this purpose. The appellants have offered no legitimate reason to be at the factory premises at dead of night on a holiday. The Magistrate has rejected the innocent reason given by the 1st accused. The conduct of the prosecution witnesses in stopping the lorry clearly shown that everyone on this estate must know that tea cannot be removed from the factory in these circumstances. It is too much of a coincidence that the appellants came to the scene of offence innocently at a time when some thieves were committing an offence. The presence of the 2nd and 4th accused on the compound of the factory near the lorry at the time of the theft and the presence of all the appellants in the lorry with the stolen property a few hundred yards from the scene of the theft point irresistibly to the conclusion that their presence together was in furtherance of the common intention of them all to commit theft of tea.

In these circumstances the presumption that the appellants are the thieves could have been drawn. The Magistrate has given satisfactory reasons for his conclusions. The convictions and sentences of the appellants of theft on Count 1 are therefore affirmed. At the same time it is not possible to convict them of retention of stolen property as well. Receiving or retaining stolen property is a separate offence and a thief cannot at the same time be a receiver of stolen goods. For this reason the conviction on Count 2 cannot stand. I set aside the convictions on Count 2. Subject to this variation the appeals are dismissed.

G. P. S. DE SILVA, J. – I agree.

Conviction and sentence on Count 1 (theft) affirmed.
Conviction on Count 2 set aside.