1928.

Present : Drieberg J.

PERIES *v.* ANDERSON.

591—P. C. Chilaw, 1,928.

Arrest—Retention of stolen property—Cognizable offence—Criminal Procedure Code, s. 25.

A salesman in a boutique to whom a 25-cent piece was given for the purchase of cigarettes by a chauffeur, employed by the appellant, denied the receipt of the money. Immediately after, on being questioned by the appellant, the salesman pointed to a 25-cent coin as it lay on the floor of the boutique. This explanation was not accepted by the appellant, who found the 25-cent piece, which he had given his chauffeur, in a drawer. The appellant used some degree of force on the salesman in taking him in the Police Station.

Held that, under the circumstances, the salesman was not guilty of dishonest retention of stolen property and that the action of the appellant in removing him to the Police Station was unlawful.

Held also, that a person who commits dishonest misappropriation of property cannot be convicted of dishonest retention of the property misappropriated, where there was no appreciable interval of time between the commission of the dishonest misappropriation and the manifestation of his intent to retain dishonestly the property, which he so misappropriated.

APPEAL from a conviction by the Police Magistrate of Chilaw. The facts appear from the judgment.

H. V. Perera (with *Croos-Dabrera*), for accused, appellant.

Hayley, K.C. (with *L. A. Rajapakse*), for complainant, respondent.

October 12, 1928. DRIEBERG J.—

The appellant has been convicted of using criminal force on Jorolis, a salesman in the boutique of the respondent, and sentenced to pay a fine of Rs. 10.

The Police Magistrate has accepted for the purposes of this case what the appellant was told by his chauffeur Yoosoof and that the appellant honestly believed in the truth of those facts.

The appellant halted his car near the respondent's boutique and sent Yoosoof there with a 25-cent piece to buy some cigarettes. The appellant says that the particular coin he gave was much blackened and discoloured and readily recognizable. Yoosoof took the money to the boutique, placed it on a table, and asked for cigarettes ; he says that the coin rolled into the drawer, but that

Jorolis denied the receipt of the money and refused him the cigarettes. Yosoof then went back to the car and related this to the appellant who then entered the boutique and asked Jorolis " Where is the 25 cents which I sent by my driver for the cigarettes ?' Jorolis then pointed to a 25-cent piece on the floor and said " Here is your 25 cents, Sir." The appellant then asked him why he did not call out to the car and let him know that he had found the money and ordered Jorolis to pick the coin up. Jorolis refused, and on the appellant himself picking up the coin he found that it was not the particular coin given to Yoosoof. He then compelled Jorolis to open the drawer of the table and there he found the very coin which he had given Yoosoof. The appellant then used some degree of force or compulsion in taking Jorolis to the Police Station, and this is the offence with which he is charged.

The appellant can justify his action only under section 35 of the Criminal Procedure Code, that is, he must show that Jorolis committed a cognizable offence in his presence.

Now, I do not think that the offence committed by Jorolis, if Yoosoof's evidence be true, was theft. There was no taking of the property from Yoosoof; Yoosoof gave him the money, and there was nothing dishonest in the manner in which he acquired possession of it, but the dishonesty occurred when he denied the receipt of the money. His offence therefore was dishonest misappropriation of property, an offence punishable under section 386 of the Penal Code. Now this offence is non-cognizable, and the commission of it in respect of the appellant's property would not give him a right of arrest even if it had been committed in his presence.

Mr. H. V. Perera has argued that at the time when the appellant went up to Jorolis the offence which the latter was committing and which he continued to commit in the presence of the appellant was that of dishonestly retaining stolen property, an offence punishable under section 394 of the Penal Code. This offence is cognizable and would justify the arrest of Jorolis by the appellant if it was committed in his presence.

Mr. Hayley argued with reference to some English cases that it was not possible for a person to commit the offence of dishonestly receiving stolen property in respect of property which he had himself stolen. Section 95 of the Larceny Act of 1861 makes it an offence for anyone to receive property known to be stolen, but does not so far as I can see bring in the word " retain " which we have in our Code and the Indian Code.

It must be allowed that it is possible for the actual thief to be charged and convicted of dishonest retention of property. Authority for this will be found in the case of *The Empress v. Sunker Gope.*[1]

[1] *(1880) 6 Cal. 307.*

1928.

DRIEBERG J.

Peries v. Anderson.

In that case cattle were stolen in Nepal and the accused was charged and convicted of dishonest retention of the cattle within British territory. A conviction could not have been maintained in a Court in British India on the charge of theft in the kingdom of Nepal.

In that case the theft and the retention with which the accused was charged were acts separated by intervals of time and space.

In the present case there was no appreciable interval of time between the first manifestation of the dishonest intent, which was the denial of the receipt of the coin from Yoosoof, and the entry of the appellant into the boutique.

Intention is not a momentary phase of the mind but is a continuing one. It would appear that Jorolis had repented of his intention for he surrendered to the appellant the 25 cents. I do not think it could be said that during this short interval of time during which his intention was getting clear and fixed, his offence could be said to have developed into what might be regarded as the later stage, viz., a retention of property known to be stolen. Stolen property would include, of course, property which has been acquired by dishonest misappropriation.

In the view which I have taken it is not necessary to deal with the point taken by Mr. Perera, which was that the offence continued after Jorolis had made available to the appellant another 25-cent piece. It appears to me that the appellant claimed no special right of property in this particular 25-cent coin and that his only reason for insisting on its production was to have proof available of the fraud committed on Yoosoof.

No cognizable offence having been committed by Jorolis in the presence of the appellant, the appellant was rightly convicted and I dismiss his appeal.

Appeal dismissed.