LIYANARACHCHI AND OTHERS

v.

OFFICER-IN-CHARGE POLICE STATION, HUNNASGIRIYA

COURT OF APPEAL.
MOONEMALLE, J. AND BANDARANAYAKE, J.
C. A. 402 - 403/80.
M. C. TELDENIYA 13411.
MARCH 4, 1985.

Criminal Law – Theft – Abetment of theft – Assisting in concealing or disposing of stolen property – Section 396 of the Penal Code – Dishonest misappropriation – Misjoinder – Presumption of innocence – Right to silence.

The 1st accused-appellant was convicted of the theft of four gallons of diesel oil from a bus of the Ceylon Transport Board while being driver thereof and the 2nd accused-appellant of abetment. The 1st accused-appellant was also convicted of in the same transaction voluntarily assisting in the concealing or disposing of stolen property knowing it to be stolen. At the conclusion of the case for the prosecution the Magistrate while informing the accused of his right to give evidence told them that if they did not give evidence it was open to the Court to conclude they were guilty.

Held –

(1) The joinder of the charge of theft with that of voluntarily assisting, in the same transaction, in the concealing or disposing of stolen property against the 1st accused-appellant was bad. The offence of voluntarily assisting in the concealing or disposing of stolen property under section 396 of the Penal Code is meant to deal with a situation when subsequent to the theft, persons deal with stolen property but cannot be punished for receiving or retaining such property as the evidence falls short of possession.

(2) The 1st accused-appellant being an employee of the C.T.B. entrusted with the bus from which the diesel oil was taken, could not have committed theft as he already had lawful custody of the stolen property. The offence of which he could have been properly accused was dishonest misappropriation but as there was *no doubt* regarding the facts led in evidence the Court cannot alter the conviction to one of dishonest misappropriation without charging the accused afresh.

(3) As the facts do not disclose the offence of theft no charge for abetment of theft can be maintained.

(4) The presumption of innocence which is an expression of the privilege against self-incrimination is a recognised principle of criminal justice in Sri Lanka. The presumption carries with it the corollary of the right to silence. The Magistrate was wrong to give the accused the impression that if they remained silent they do so at their peril.

Cases referred to :

(1) *Stephen v. Inspector of Police, Fort (1966) 69 NLR 42.*

(2) *Salgado v. Mudali Pulle (1941) 43 NLR 94.*

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

D. S. Wijesinghe for accused-appellants.

Y. J. W. Wijeyatilleke, S. C. for Attorney-General.

Cur adv vult.

June 6, 1985.

BANDARANAYAKE, J.

The 1st accused-appellant was charged on two counts, viz : (i) with the theft of 4 gallons of diesel oil, the property of the C.T.B. whilst being a driver or servant of the Board, and (ii) in the same transaction with assisting in the concealing or disposing of stolen property knowing it to be stolen. The 2nd accused-appellant was charged with (i) abetment of the said offence of theft and (ii) with assisting in such concealing or disposing of the said stolen property knowing it to be stolen.

The 1st accused-appellant was at the relevant time a driver of the C.T.B. The prosecution case was that at about 7.30 p.m. a C.T.B. bus stopped a short distance away from the house of witness Jayatilleke and a short while thereafter Jayatilleke saw the 2nd accused-appellant siphoning off a quantity of diesel oil from the tank of the bus. The 1st accused-appellant whom he knew well was standing beside the 2nd accused-appellant. Later the bus was reversed by the 1st accused-appellant who struck against a temporary shed put up by

the witness and the shed collapsed. Witness then made a complaint to the Grama Sevaka that same night about the destruction of his building. Witness has not however made any mention of the removal of diesel oil from the bus by the accused-appellants. Another witness Jinadasa said that that same night he bought 4 gallons of diesel oil from the 1st accused-appellant. He gave his diesel can and a rubber hose for that purpose. An empty can and a rubber hose were found in the bus that same night by the Police.

Upon a complaint made to the Hunnasgiriya Police the same night the Police found the two accused-appellants and the cleaner sleeping in the bus that same night which was parked on the road near witness Jayatilleke's house.

Counsel for the accused-appellants besides canvassing the findings of fact urged several matters of law which he submitted vitiated the convictions of both accused-appellants. In the first place he submitted that the charges of theft and assisting in the concealing or disposing of stolen property cannot be framed against an accused at one trial as having been committed in the same transaction. He cited the case of *Stephen v. Inspector of Police, Fort* (1) in support and submitted that the charges against the 1st accused-appellant were therefore bad in law.

As a second matter of law learned Counsel submitted for the consideration of the Court that the facts are clear in that the 1st accused-appellant was an employee (a driver) of the C.T.B. entrusted with the bus and as such even if the evidence is believed he could not have committed the offence of theft as he already had lawful custody of the stolen property and that the proper offence should have been one of misappropriation. This was pointed out to the learned Magistrate who nevertheless convicted the accused of theft. Counsel submitted that as there was *no doubt* upon the facts led in evidence the Court cannot alter the conviction to one of dishonest misappropriation in any case. In support of this submission he cited a decision of Moseley S. P. J. (in the case of *Salgado v. Mudali Pulle* (2)) that where on the facts there could be no doubt as to the particular offence, then it is not open to the Magistrate to convict the accused on an alternative charge without charging him afresh. The conviction of theft was in these circumstances bad in law.

For a third matter of law learned Counsel pointed to the proceedings at p 22 –The accused were defended by Counsel. Yet, at the close of the prosecution case the learned Magistrate has, whilst calling upon the accused-appellants for their defence informed them that they had a right to give evidence but that if they do not testify, the Court has a right to convict them. The Sinhala words used are : "සාක්ෂි නුදුන්නොත් විත්තිකරුවන් වරදකරුවන් යයි තීගමනය කිරීමට ඉඩ තිබෙන බව දන්වා සිටිමි." The 1st accused-appellant then elected to give evidence and denied the charges. The 2nd accused did not testify. It was submitted by Counsel for the appellants that this statement of the Magistrate amounted to a threat and had the effect of compelling the accused to testify for fear of conviction and that this amounted to an illegality that vitiated the trial.

It is my opinion that there is merit in the first matter of law raised. The offences of theft and that of voluntarily assisting in knowingly concealing or disposing of stolen property are distinct offences which could not be committed by the same person in a continuing transaction. The offence of theft is complete with the moving of property dishonestly out of the possession of a person. The offence punishable under s. 396 is meant to deal with situations where, subsequent to the commission of the offence of theft, persons deal with stolen property but cannot be punished for receiving or retaining such property as the evidence falls short of possession. The joinder of Counts 1 and 3 against the 1st accused-appellant is therefore bad in law.

As for the second matter of law raised the facts of the instant case are clear thet the 1st accused-appellant was at the relevant time a driver of the C.T.B. and therefore had possession of the vehicle and the diesel. The learned Magistrate has sought to rely on s.366 illustration (*d*) where a servant commits theft by dishonestly running away with plate entrusted to him by his master. The Magistrate seeks to distinguish between being in 'charge' of property and having possession' of property. The distinction is misconceived in the circumstances. In the offence of theft the object is to deprive a person of possession and the offence is complete as soon as the property is moved' in order to dishonestly take it. Dishonest misappropriation is different. The offender is already in possession and further, there must be misappropriation or conversion. That is to set apart or assign the property to a wrong person or for wrong use. The facts show that the

diesel oil from the C.T.B. bus was sold privately to a witness for profit. There has therefore been a conversion of the property to the accused-appellants' use. The facts being so, the appropriate charge should have been one of dishonest misappropriation and not merely of theft. The illustration cited to s.366 therefore has no application to the facts. The facts being clear, the conviction for theft is bad in law. As there was no doubt in regard to the offence committed on the facts, s. 176 of the Criminal Procedure Code Act has no relevance and cannot be applied to this case. A fresh charge would have been appropriate in the circumstances.

As regards the third matter of law raised in the appeal, the words used by the Magistrate in calling upon a defence are unfortunate. It certainly leaves an impression that an accused would remain silent at his peril. The presumption of innocence which is an expression of the privilege against self-incrimination is a recognised principle of criminal justice in Sri Lanka. The presumption carries with it the corollary of the right to silence. The failure of an accused to give an explanation when one is expected may give rise to discretionary presumptions as provided by law but one must not choose words which may give an accused an impression that he must testify if he wants to stand a chance of an acquittal. In the circumstances, this objection is entitled to succeed as the accused have been deprived of the substance of a fair trial. The 2nd accused-appellant has been convicted on Count 2 only, namely of abetment of theft and acquitted on Count 3. As the facts do not disclose the offence of theft as stated earlier but of criminal misappropriation for which there is no charge his conviction for abetment of the offence of theft cannot be maintained. For these reasons, I set aside the convictions of both accused on all Counts and discharge them from the proceedings

MOONEMALLE, J. – I agree.

Conviction set aside

Accused discharged.