HARMANIS *v.* BOCHIA *et al.*

1895.
February 13 and 21.

C. R., Kandy, 3,613.

Burden of proof—Action for damages against headman—Plea of theft of animal damage feasant entrusted to headman—Proof of theft and exercise of ordinary care.

In an action against a police headman for damages for loss of a cow which, being caught trespassing, had been entrusted to him as a headman for detention until the damages were paid, he pleaded theft of the cow from his possession—*Held*, that the burden of proving that the animal had been stolen and that he had taken ordinary care of it lay on the defendant.

THE first defendant seized the plaintiff's cow damage feasant and entrusted it to the second defendant, a police headman, for detention under Ordinance No. 9 of 1876, section 7, until the damages assessed as due to the first defendant were paid. The cow was lost while in the possession of the second defendant, and thereupon the plaintiff sued both the defendants for the value of his animal. The second defendant pleaded that the cow had been stolen from his possession, notwithstanding that he had taken ordinary care of the animal, but called no evidence to substantiate this plea. The Commissioner dismissed the plaintiff's claim with costs.

On appeal by plaintiff, *Wendt* for him.

21st February, 1895. LAWRIE, A.C.J.—

In my opinion the plaintiff is entitled to judgment. The second defendant, a local headman, admits that the plaintiff's cow was entrusted to him to detain it until the damage done by its trespass was paid. To this action in detinue he pleads that the morning after it was given to him he discovered that the animal had been stolen from his garden where it had been secured. The burden of proving that the animal had been stolen and that he had taken ordinary care of it lay on the defendant. This he did not attempt to do.

[*Morgan Dig. 241 ; 2 Lorenz, 114 ; 3 Lorenz, 145, 250 ; Ramanathan, 1872, 9 and 187 ; 2 S. C. R. 140.*]

Set aside and judgment entered for plaintiff with costs.

1898.
July 25.

PUNCHI *v.* BABA APPU *et al.*

P. C., Matara, 31,475.

Evidence—Presumption of theft from recent possession of stolen property—Conviction of one of several joint occupants of a house or room, or one of several persons who had equal access to an open box, where recently stolen property is found—Proof of exclusive possession.

In a case of theft of property, no definite presumption of guilt could be made against the accused, if the property stolen were only found lying in a house or room in which he lived jointly with others equally capable with himself of having committed the theft, or in an open box to which others had access.

In order to raise this presumption legitimately, the possession of the stolen property should be exclusive as well as recent.

Empress v. Malhari, VI., I. L. R., Bombay Series, p. 731, followed.

UPON a petition presented by one Nonatcho, who described herself as the daughter of Kirinda Arachchige Baba Appu, who was convicted on the 27th of June last in the Police Court of Matara for the offence of theft of a box and its contents of the value of Rs. 35 from a building used as a human dwelling, Mr. Justice WITHERS called for the record of the case, in order to satisfy himself as to the legality of the conviction and sentence passed upon him.

His Lordship set aside the conviction and acquitted Baba Appu in the following judgment.

25th July, 1898. WITHERS, J.—

In my opinion the conviction is not a legal one, there being no evidence to support it. The facts are briefly these :—

On the 3rd June this Baba Appu and Punchihamy, his wife, were produced by the police before the Court with a stolen box and some of the articles contained in it when it was stolen. The first witness for the prosecution, Punchi, identified the box as hers, and deposed that early at daybreak on 2nd June she missed this box, under circumstances which indicated that some one must have stolen it. She was much distressed on this discovery, but was relieved by her brother coming and telling her that her box was in the house of Punchihamy, first accused. At the close of this person's examination, the accused were apparently called upon to show cause why they should not be convicted. Punchihamy, the wife, made this statement : " This box produced was found in my

" house. I saw it there when I returned home yesterday morning " (2nd June) from my sister's house. I do not know who brought " the box there. The second accused is my husband. He sent " for the key of our house while I was at my sister's, and I sent the " key by a child. I did not steal these articles."

Baba Appu, the second accused, made this statement: " I never " borrowed the key from my wife. I do not live with her. I lived " apart from her for the last five or six years."

According to the constable, he was informed of this theft about 10.30 A.M. on 2nd June. He went to the house where the box was said to be and found it there. The house was unlocked by the first accused and the constable was admitted. While he was making the search the second accused came up.

The prosecutor's brother, Mathes, deposed that on hearing of this box he suspected the first accused Punchihamy, and it was on his information that the police searched the house. It would seem that the ground of this witness' suspicion was the fact that first accused has a brother in the hamlet, who is a notorious thief. This witness confirmed the second accused's statement, that he and his wife lived apart. They had lived apart, according to this Mathes, for more than a year in consequence of a quarrel.

That was the case for the prosecution. Then, the first accused Punchihamy gave evidence on her own behalf, and she said that she did not steal the articles in Court. She saw them one morning, about a month ago, in her house, and did not know how they came there. They were not there the night before.

According to her, her husband, the second accused, four children of hers, and her son-in-law live in the house, her husband sleeping, as a rule, on the pi-la. She declared that her husband and she were on good terms and had never parted. This woman called two of her sons Sinho and Siadoris. They said they were at home on the night of the alleged theft, and did not know how the box of clothes got into their house. They both supported their mother in the statement that their father, the second accused, had had no quarrel and lived together, and that he was at home that night.

The second accused called himself as a witness. He denied the theft. He denied being in his wife's house the night of the theft. He swore that he had lived apart from her (his wife) for a year owing to a quarrel and a fight. He further swore that on the night of the occurrence of the theft he slept at the house of one Dinneshamy, with whom he had been living since his separation a year ago. Dinneshamy was called and swore that for eighteen months the second accused, Baba Appu, had regularly slept at his house.

1898. *July 25.* WITHERS, J.

How the Magistrate, on the face of this evidence, supported by a witness for the prosecution, came to the conclusion that second accused had signally failed to prove that at the time of this theft he was living apart from his wife, I am at a loss to understand. He could not take the wife's evidence into consideration at all. But of course I will assume that the second accused, Baba Appu, was sleeping at the house on that night. Because he was there that night the Magistrate presumes that he must have been aware of the presence of the stolen property, and he says "as it was seen "there so soon after the theft, the presumption is that he was the "thief." But in this case no such presumption can be made. For, according to the wife, her two sons and her son-in-law lived in the house jointly with her husband, and there was no evidence that the box was found in the exclusive possession of the second accused. In the case of *Regina v. Malhari, vol. VI. of Indian Law Reports, Bombay Series*, Mr. Justice MELVILL, in regard to a dacoity case which came up before him in appeal, made the following observation:—"But if the articles stolen were only "found lying in a house or room in which he lived jointly with "others equally capable of having committed the theft, or in an "open box to which others had access, no definite presumption of "his guilt could be made." I adopt that language. Clearly, in my opinion, the conviction is not supported by any evidence, and I propose to deal with the case as I should had it come up in due course of appeal.

The judgment must be set aside and one of acquittal substituted for it.