IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Criminal Appeal No.4 of 1984

Between:

SURESH PRASAD s/o Jati Ram — Appellant

and

REGINAM — Respondent

J.R. Reddy for the Appellant
V.J. Sabharwal for the Respondent

Date of Hearing: 1st July, 1984
Delivery of Judgment: 1st July, 1984

JUDGMENT OF THE COURT

O'Regan, J.A.

On 11th August, 1983 the appellant was convicted in the Magistrate's Court at Nadi on one charge of larceny and on 3rd February, 1984 his appeal to the Supreme Court against that conviction was dismissed. The present appeal has been brought, pursuant to subsection (1) of section 22 of the Court of Appeal Act (Cap. 12), on questions of law only.

The charge preferred against the appellant was that between 4th December, 1982 and 5th December, 1982, at Keolaiya, Sabeto, Nadi, in the Western Division, he stole a water pump valued at $285, the property of Kasi Nath s/o Hari Prasad.

The learned magistrate accepted the evidence of the complainant that a water pump belonging to him had been stolen between the dates alleged. The complainant described the pump thus :

> " The pump was a Finsbury red, benezene (sic) 3 h.p. ..... At the outlet pipe it was rust guard painted. The pump was 4 months old. It still looked brand new. "

The pump was never recovered.

The learned magistrate accepted also the evidence of three mechanics employed in a garage at Waiyavi, Lautoka, owned by M. Reddy & Sons, to the effect that the appellant came by car to the garage around midday on 6th December, 1982 and that he had with him, in the boot of his car, a water pump. The appellant allowed that he had so attended at the garage but denied both to the police when he was interviewed, and on oath at the hearing that there was then a pump in the boot of his car. Although the learned magistrate did not expressly so say, his acceptance of the evidence of three mechanics means the rejection of the evidence of the appellant and the conclusion that the appellant had lied both in and out of court as to his possession of a water pump when he attended at the garage.

On the basis of the descriptions given on the one hand by the complainant and on the other by the three mechanics the learned magistrate concluded that the pump which was in the appellant's possession at the garage, was indeed the pump of the complainant and on a close reading of his reasons for judgment it is manifest that he acceded to the submission of the prosecution to apply what is compendiously described as the doctrine of possession of recently stolen property, a concise statement of which is to be found in an article by the late Mr. Justice F.B. Adams in 1967 N.Z.L.J. 495 and 511 :

" ..... the possession of property recently stolen is, in the absence of an explanation that might be true and would negative guilt, sufficient to justify a finding that the possessor is either the thief or a dishonest receiver.

..... The choice between theft on the one hand and receiving on the other depends on the circumstances of the case. "

The learned magistrate put it thus :

" The court is supremely aware of the lack of direct evidence of theft and of the non-recovery of the pump but is totally and irresistibly drawn to only one explanation that is the accused's possession of the water pump, denied, unexplained on 6/12/82 declares him to be the thief. "

And on that footing he found him guilty.

The final formulation of the grounds of appeal were :

1. THAT the Learned trial Magistrate and the Appellate Judge both erred in law in coming to the conclusion that the water pump seen in the boot of the Appellant's car on the 6th of December, 1982 by Prosecution Witnesses 2, 3 and 4 was the property of Prosecution Witness No.1 when such conclusion is based partly on hearsay evidence given by Prosecution Witness No.1 and was reached without a proper evaluation of the evidence given by Prosecution Witness No.4.

2. THAT the Learned Judge erred in holding that the Learned trial Magistrate did not misdirect himself as to the onus of proof.

It is convenient to deal first with the second ground which has its genesis in that part of the passage from the judgment quoted above which alludes to "the possession of the water pump" being "unexplained". Once it is accepted - and we do accept - that the learned magistrate was purporting to apply the doctrine of possession of recently stolen property, his reference to possession of the pump being unexplained is quite understandable and acceptable and is not what it might appear to be on a cursory reading - a reversal of the onus of proof.

The crucial issue is encompassed in the first ground of appeal, it being fundamental to the application of the doctrine of recent possession that it be proved beyond reasonable doubt not only that the property in possession of the accused person was stolen but also that it was the property of the complainant. And on these matters that Mr. Reddy has argued that both the learned magistrate and the learned Judge have erred.

The first of three mechanics described the pump which he saw in the boot of the appellant's car as follows:

> " ..... a Finsbury water pump, 3 h.p., reddish. The outlet pipe was painted in rust guard red. ..... It was a mechanical pump, with engine, benzine fuelled. Finsbury was written on the side, smallish print. "

The second mechanic said :

> " I saw a water pump on that day in the car of the accused ..... It was red .. .. I did not see the make of the pump."

The third mechanic who saw the pump was Rissun Deo who is a son-in-law of the complainant. When he saw the pump he already knew that the complainant's pump had been stolen. He gave the following description

of the pump :

> " The pump was red, the hose outlet pipe rustguard red painted. I did not see the brand name on the engine. It had been used, the paint in the muffler was burnt. It was a new pump. "

And he later said that he was at the complainant's property when the latter's pump was installed and the rustguard painted on. But he was not asked nor did he volunteer to make a comparison between the complainant's pump and the pump he saw at the garage. Indeed, we rather think that the general tenor of his evidence is that he did not associate the pump he saw with that of the complainant.

The complainant deposed that he went to the police station at Sabeto and then to Reddy's garage as a result of a phone message from Bissun Deo. The relevant evidence reads :

> " I went to Reddy's garage on 6/12/82 because Bissun had phoned about a water pump being offered there. ..... I did not myself speak to Bissun. I was told that Bissun had phoned. The accused's name was not mentioned. ..... Bissun knows my water pump. "

Dealing with this evidence the learned magistrate observed :

> " There are oddities in the case. The police information came from P.W.4 (Bissun Deo) who phoned a message to P.W.1 who relayed it to the police but P.W.4 was not asked on the point. P.W.4 knew on 6/12/82 of the missing pump but although he knew P.W.1's pump, did not relate that he connected it in his mind with the one the accused was carrying in his boot. "

And later :

> " P.W.4's connection with P.W.1 is strangely coincidental. His acquaintance with the accused

> is a disputed matter but he was not cross-examined on it, nor on his information to P.W.1 about the accused's attempted sale. It was strange but his evidence looked at alongside P.Ws. 2 and 3 is quite accepted. "

Mr. Reddy submitted that in holding as he did that the pump in the boot was the complainant's, the learned magistrate must have concluded that Bissun Deo had stated in the telephone message which was ultimately relayed to the complainant, that it was indeed the complainant's pump which he saw. On that basis, Mr. Reddy further submitted that if such be the case the learned magistrate had relied on hearsay evidence.

We do not think the matter need be taken so far as that. The complainant's evidence was that the message he received was about a water pump being offered for sale at Reddy's garage. Bissun Deo, in evidence, said nothing about the phone call and as the evidence stands it seems to us that the import and implication of the message which was relayed to the complainant was that he should know that a water pump being offered there and should have the matter investigated. We think that both the absence of any material in the evidence of Bissun Deo linking the pump in possession of the accused with that of the complainant and the complainant's evidence as to the burden of the message, indicate that Bissun Deo did not associate the two and indeed the learned magistrate so held. It follows, then, that the evidence of Bissun Deo is bereft of material of assistance to the prosecution and the evidence of the other two mechanics does no more than establish that the pump in possession of the appellant bore similarities to the complainant's pump. That, of course, falls short of proof that it was the complainant's property. It follows that the prime factor in the application of the doctrine of possession of recently stolen property, namely proof of property identity was not established.

Mr. Reddy submitted also that the learned magistrate erroneously placed reliance on the appellant's false denial that he had a water pump in the boot of his car on 6th December, 1982. The learned magistrate said :

> " The accused, the Court accepts, had a water pump in the boot of the car on 6th December, 1982. He denies it. One must wonder why if he has nothing to do with the stolen water pump."

And later, in a passage already quoted, he allied the denial of possession of the water pump with the unexplained recent possession, as leading to an irresistible inference of guilt. The acceptance of the evidence of the prosecution witnesses as to the presence of a pump in the boot of the car rendered the appellant's denial a lie. That lie, however, does not establish or go to establishing that the pump in the boot of appellant's car was the property of the complainant, it being clearly explicable on grounds both innocent and sinister which do not touch that issue. In that circumstance the lie cannot be relied upon by the Crown - see Dehar (1969) N.Z.L.R. 763 at 764-5; Lucas (1981) 1 Q.B. 720, 724.

All in all, we uphold Mr. Reddy's submissions and allow the appeal.

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Vice President

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Judge of Appeal

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Judge of Appeal