ANTHONY STEVEN

v.

REGINAM

[COURT OF APPEAL, 1971 (Gould V.P., Marsack J.A., Richmond J.A.), 20th April, 4th May]

Criminal Jurisdiction

Appeal—Criminal appeal—misdirection by magistrate on matter of law or principle not lightly assumed—onus on appellant—Penal Code (Cap. 11) s.333(a)—Court of Appeal Ordinance (Cap. 8) s.22(1).

Criminal law—judgment—joint trial—magistrate's duty to distinguish evidence against each accused—evidence against two accused discussed together in judgment as matter of convenience—no breach of principle.

Criminal law—evidence and proof—admissibility—joint trial—knowledge by co-accused of whereabouts of articles similar to those stolen—like articles in house of appellant—evidence admissible against appellant as part of pattern showing guilty nature of association.

While it is clear law that in a joint trial of several accused persons a magistrate must consider the case against each accused separately, carefully distinguishing the evidence admissible against one accused from that admissible against another, an appellate court will not lightly assume that the magistrate has misdirected himself on some matter of law or has followed some erroneous legal principle. The onus is always upon the appellant to satisfy the appellate court that there are sufficient grounds for making such an assumption, and it is not a departure from correct principles for a magistrate, as a matter of convenience, to discuss in his judgment the evidence against two or more accused simultaneously if that evidence is to a greater or lesser degree admissible against both or all of them.

Evidence that another of the accused had knowledge of the whereabouts of a concealed tape recorder similar to those found in the house of the appellant and to those proved to have been stolen, was admissible against the appellant as part of a pattern of evidence pointing to the fact that the association between the two men was linked to the burglary in question.

Cases referred to :

R. v. Harris (1924) 18 Cr. App. R.157; 132 L.T. 672.

R. v. Finn 22 Jnl. of Crim. Law 271.

R. v. Loughlin (1951) 35 Cr. App. R.69; [1951] W.N. 325.

Appeal to the Court of Appeal against the dismissal of an appeal by the Supreme Court sitting in appellate jurisdiction on a conviction in the Magistrate's Court.

S. M. Koya for the appellant.

A

T. U. Tuivaga for the respondent.

The facts sufficiently appear from the judgment of the Court.

4th May 1971

B Judgment of the Court (read by Richmond J.A.) :

The appellant was on the 7th April, 1970, convicted in the Magistrate's Court at Suva of the offence of shop-breaking entering and larceny contrary to Section 333(a) of the Penal Code (Cap. 11). He appealed to the Supreme Court against his convicton and his appeal was dismissed by
C Knox-Mawer J. on the 7th September, 1970. From that decision he has now appealed to this Court pursuant to Section 22(1) of the Court of Appeal Ordinance (Cap. 8) whereby the right of appeal is restricted to questions of law only.

The original charge was against the appellant and five others jointly. The particulars were as follows :—

D

Particulars of Offence

GARY MARMADUKE A'COSTA, HARRY AITCHESON, DANIEL JAMES POWELL, DAVID JOSEPH BLACK, ANTHONY STEPHENS, and JOSEPH MOW alias DICKY, between the 18th and the 19th day of January, 1970, at Suva, in the Central Division, broke and entered
E the bulk store of D. GOKAL and Company and stole therein 13 crowncorder tape recorders valued at $845.00, 4 sets cassette radio tape recorders valued at $360.00, 2 sets radio tape recorders valued at $140.00, 1 set of R.S. Tape recorders valued at $500.00, 1 "Akai" speaker valued at $95.00, 7 minolta cameras valued at $770.00, 2 sets crown tape recorders valued at $120.00, 1 crowncorder tape recorder valued at $70.00, 3 sets of CTR tape recorders valued at $180.00,
F 2 sets of CTR tape recorders valued at $140.00, and one set of tape recorder value of $3290.00 the properties of the said D. GOKAL and Company, Suva.

Each of the six accused elected to be tried in the Magistrates' Court and after hearing lengthy evidence, the learned Magistrate acquitted the
G 1st, 3rd, 4th and 6th accused but convicted the 2nd accused (one Aitcheson) and the 5th accused (the present appellant).

The evidence, insofar as it was relevant to the case against Aitcheson and the appellant, was as follows :—

On Friday, 16th January, 1970, the appellant borrowed a car from a
H friend. Between 8 a.m. on Sunday 18th January and 6 a.m. on Monday 19th January, the bulk store of D. Gokal & Co. was broken and entered and a number of tape recorders and cameras were stolen and also 1 "Akai" speaker. The door had been left secured by a "Union" padlock. It had been forced open to gain access to the store.

About 6 a.m. on Monday, 19th January, a fifteen year old boy discovered (by accident) a big parcel containing 23 cartons hidden in a cave at Bilo Battery Hill. The police were informed. The 23 cartons contained tape recorders of various kinds similar to those missing from the bulk store and also an "Akai" speaker identified by serial number as definitely coming from the store. While the police were still at Bilo, a car was seen reversing up the track. It stopped close to the place where the parcel was hidden. It was driven by the appellant and turned out to be the car which he had borrowed on the previous Friday. Aitcheson and another young man were also in the car.

A Detective Sergeant found an empty carton in the back seat. He asked appellant to open the boot. Appellant gave him the key and the Detective Sergeant after opening the boot, found 3 tape recorders, 7 cameras, some tools and a "Union" padlock. The tape recorders and cameras were similar to goods missing from the store. Mr. Gokal's key fitted the padlock. He identified the padlock in evidence and this identification was not challenged in cross-examination.

After finding the various articles in the boot, the Detective Sergeant cautioned the appellant and then asked him a number of questions. The Magistrate, after a "trial within a trial", admitted evidence of this conversation, which was as follows :—

"Q. May I know your name?

A. Anthony Stephens.

Q. Where did you get this empty box in the back seat of your car No. U207?

A. I bought it from Kumar and Kumar of Suva.

Q. How much did you pay?

A. Only 30 cents.

Q. May I have your key?

A. Here it is. Q. Just open the boot for me please.

Q. He gave me the key and I opened the boot and found 7 minolta cameras, 3 crowncorder tape recorders. At that point he asked me if I had a search warrant and I said "no but I have a right to search your vehicle". I then cautioned him.

Q. Where did you get these three crowncorder tape recorders?

A. I won't tell you.

Q. Where did you get the 7 minolta cameras?

A. Someone gave me.

Q. Who was driving this car U207 last night?

A. Myself.

Q. You came here to get the other stolen properties?

A. No. What properties.

Q. Anthony all this property in your car and one in the cave belong to D. Gokal of Suva.

A. I don't know.

Q. Who broke the bulk store of D. Gokal at Foster Street with you?

A. Sergeant — myself, Harry, Gary, David Black and Daniel.

Q. Who broke the lock?

A. David Black.

Q. Where did you get all these house-breaking implements?

A. I don't know.

Q. Who is the owner of the car U207?

A. Mrs. Wright.

Q. Where is she staying?

A. At Rewa Street.

Q. Where did you get this padlock from?

A. I don't know.

Q. Where are the rest of the stolen goods?

A. I got 4 crowncorder tape recorders in my house."

The appellant was then arrested and a series of questions were put by the Detective Sergeant to Aitcheson. This evidence was also admitted by the Magistrate. We need not refer to it in detail, but it included evidence as to a confession by Aitcheson that he was a party to the burglary. Aitcheson was also arrested. Subsequently, at the police station, he told the Detective Sergeant that he had a "Crown" tape recorder hidden at Kasava Plantation with some other property. The Detective Sergeant went there and found a tape recorder hidden under a sack. As a result of the last answer given by the appellant in the course of the interview which we have already recorded, the Detective Sergeant also visited the appellant's house and found 4 tape recorders in a locked tool-room. The 5 tape recorders were identified as being similar to goods missing from the bulk store.

The learned Magistrate, in a lengthy reserved judgment, first reviewed the evidence in a general way. After referring to the fact that "Each of the accused elected to say nothing, as is their right", he then said :—

> "Let me now consider the evidence in relation to each of the Accused. I propose to deal first with the 6th Accused, then the 3rd and 4th together, then the 1st Accused and finally the 2nd and 5th Accused."

For reasons which will appear later we find it necessary to make some reference to the way in which the Magistrate dealt with the cases against the 1st, 3rd, 4th and 6th accused.

The case against the 6th accused rested entirely on "recent possession". The Magistrate said :—

"But I am not satisfied that this tape recorder has been identified as coming from Gokal's . . . . . The Accused in his interview put forward an explanation which might reasonably be true." A

The cases against the 1st, 3rd and 4th accused rested solely on confessions. While dealing with the case against the 3rd and 4th accused, the learned Magistrate said :—

"Now a man can, in law, and the most quoted authority for this is *R. v. White*, be convicted solely on the evidence of his own confession, but in practice I personally hesitate to convict a man solely on this unless there is something, perhaps short of corroboration in the legal meaning of that term, which satisfies me that his admission is such that it warrants a conviction." B

While dealing with the case against the 1st accused he observed :— C

"As in the case of all the Accused the statement of one Accused is evidence against himself only. So, though the others name the 1st Accused that is no evidence against him. Again, the only evidence is his own confession."

From reasons which he gave in detail he was not prepared to convict either the 1st, 3rd or 4th accused on their unsupported confessions. D

We now set out in full that portion of the judgment which deals with the cases against Aitcheson and the present appellant :—

"That leaves me to consider the 2nd and 5th Accused whom I will take together. The evidence here is that on the 19th January, 1970, P.W.5 found 23 cartons at Bilo Battery, notified the Police, and later saw a car arrive driven by the 5th Accused and the 2nd Accused was in it. P.W.8 the Detective Sergeant, went to Bilo Battery in response to the information received from P.W.5. He found the 23 cartons, and while he was there a car reversed up the track from the road. It was driven by the 5th Accused and in it was the 2nd Accused. In the boot of the car was found three tape recorders and seven cameras. Also in the car was a padlock. This padlock is identified by P.W.1 as being the one from Gokal's bulk store. P.W.4 says she lent this car to the 5th Accused that week-end. One of the items hidden at Bilo Battery has been specifically identified by P.W.'s 14 and 15. The Detective Sergeant told me of confessons. Now I accept all the above evidence. I am prepared to ignore the confessions. I have not the slightest doubt that the 5th Accused when asked where he got the tape recorders found in the car said "I won't tell you." Now I am completely satisfied and find as a fact that the 5th and 2nd Accused reversed this car, which contained property identical to property stolen from Gokal's, to a point where 23 other items, identical to those stolen from Gokal's and one of which is clearly identified as coming from Gokal's, were hidden. Insofar as that is circumstantial evdence it drives me to the irresistible conclusion that the two Accused were there for the purpose of dealing with all those goods. But it does not end there. The padlock from Gokal's was found in the car. I can see no possible defence to this. If ever two men were caught red handed it is these two Accused. The law is E F G H

clear that recent possession is sufficient to justify a conviction of breaking and entering. The authority for this is *R. v. Loughlin* 35 Cr. App. R. p.69. I cannot really imagine a more open-and-shut case than this. After carefully considering and weighing all the evidence in this case I cannot even find a suspicion of doubt. I am completely satisfied. Added to all this, the Detective Sergeant found four other items concealed at the house of the 5th Accused, and these are identical to the items stolen from Gokal's, and at a plantation described to him by the 2nd Accused, he found one identical item hidden under a sack. No, I have no shadow of doubt in this case. I accept the evidence for the Prosecution in this case. I am completely satisfied. I find each of these two Accused guilty of the second count as charged and convict them accordingly."

It will be noted that the Magistrate said — "I am prepared to ignore the confessions". By this we understand him to have meant that he would ignore the direct admissions made by Aitcheson and the appellant. In the case of the appellant, this direct admission is found in the following question and answer :—

"Q. Who broke the bulk store of D. Gokal at Foster Street with you?

A. Sergeant — myself, Harry, Gary, David Black and Daniel."

We do not understand the Magistrate to have disregarded the rest of the police interview as he refers to appellant saying "I won't tell you".

We imagine that he was anxious to leave the appellant and Aitcheson with no sense of injustice caused by his giving weight to their confessions after he had refused to convict the 1st, 3rd and 4th accused. We shall approach the case in the same way.

The grounds of the present appeal, as set out in the notice of appeal, are as follows :—

Grounds of Appeal

(a) That the Learned Trial Magistrate erred in law in considering the case against your Petitioner in breach of the well established rule that in a joint trial the case of each accused should be considered and dealt with separately and independently of the other. Consequently there has been a substantial miscarriage of justice.

(b) That the Learned Trial Magistrate held in effect that your Petitioner and the said Harry Aitcheson were in joint possession of the goods and padlocks found in Motor Car No. U207 on the 19th day of January, 1970. In so doing the Learned Trial Magistrate erred in law and erred in law applying doctrine of recent possession to find your Petitioner guilty of the offence with which he was charged. Consequently there has been a substantial miscarriage of justice.

(c) That the Learned Trial Magistrate held in his judgment "Insofar as that is circumstantial evidence it drives me to the irresistible conclusion that the two accused were there for the purpose of dealing with all these goods. But it does not end there. The padlock from *GOKAL'S* was found in the car. I can see no

possible defence for this." In so doing he erred in law and consequently there has been a substantial miscarriage of justice.

(d) That the Learned Trial Magistrate erred in law in attributing to your Petitioner the finding of four items of goods at your Petitioner's house and another item found under a bush at a plantation indicated by the second accused. Consequently there has been a substantial miscarriage of justice.

In the Supreme Court Knox-Mawer J. held in effect that the evidence against the appellant was so overwhelming that there could be no such substance in any of the submissions made by counsel as would justify a quashing of a wholly justified conviction. With that view we are in entire agreement. Nevertheless, and in deference to the lengthy and careful submissions made to us by Mr. Koya, we propose to consider in some detail the several grounds of the present appeal.

1. *Ground (a)*

We do not question for one moment that in a joint trial of several accused persons, a Magistrate should proceed in the same way as a jury or assessors would be directed to proceed. He must consider the case against each accused separately, being careful to distinguish the evidence admissible against one accused from that admissible against another. He must resist any temptation to bolster up a weak case against one accused by reference to evidence properly admissble only against some other accused. We do emphasize, however, that on an appeal from a Magistrate sitting as a tribunal of mixed fact and law an appellate Court will not lightly assume that the Magistrate has misdirected himself on some matter of law or has followed some erroneous legal principle. The onus must always rest on an appellant to satisfy the appellate Court that there are sufficient grounds for making such an assumption.

In the present case the learned Magistrate prefaced his examination of the evidence against the several accused with the observation — "Let me now consider the evidence in relation to each of the accused". His treatment of the evidence against the 1st, 3rd, 4th and 6th accused manifested an anxiety to be meticulously conscientious in the application of the rules of law as to joint trials. It is not a departure from those principles for a Magistrate, as a matter of convenience, to discuss the evidence against two or more accused simultaneously if that evidence is to a greater or lesser degree admissible against all of them. The important point is that he should not use evidence against one which is only admissible against another.

It is quite clear that all the evidence referred to by the Magistrate in his review of the case against the 2nd and 5th accused was admissible against the appellant, with the one possible exception of his reference to the fact that "at a plantation, described to him by the second accused, he found one identical item hidden under a sack". It is to be remembered that on this appeal we are not concerned with the weight to be attached to evidence (a question of fact) but only with its legal admissibilty. In all the circumstances of this case, we think that evidence tending to show that Aitcheson had knowledge of the whereabouts of a hidden tape recorder identical with one missing from Gokal's was evidence which

was admissible against the appellant. When taken in conjunction with the finding of the 4 tape recorders in the appellant's house it formed a proper part (however minor) in a pattern of evidence pointing to the fact that the association between the two men at the time when they were apprehended by the police was not of an innocent character but was in some way linked with the burglary at Gokal's store.

We add that it is perfectly apparent from a reading of his judgment that the Magistrate was completely satisfied as to the guilt of the appellant without any reference to this particular evidence. It is clear therefore that the appellant has suffered no injustice in any event.

Ground (b)

This ground of appeal first alleges that the Magistrate erred in law in finding that the goods and padlock found in the boot of the car were in the joint possession of the appellant and Aitcheson.

As Mr. Koya emphasized, the legal concept of "possession" involves both knowledge of the presence of the goods and *de facto* control over the goods either alone or jointly, with another. We are satisfied that in law there was ample evidence on which the Magistrate could find as a fact that the appellant was in possession of these goods. He was in possession of the car and of the key to the boot. The association of the goods with the padlock indicated that they all were put in the boot after the burglary and not (as Mr. Koya suggested was reasonably possible) before the appellant borrowed the car. When asked by the Detective Sergeant "Where did you get these three crowncorder tape recorders?" the appellant did not disclaim knowledge of their existence but impliedly admitted it when he answered "I won't tell you". We need pursue this matter no further, nor do we propose to discuss the question of *joint* possession. From the appellant's point of view, all that matters is that there was adequate evidence to support a finding that *he* was in possession of the goods.

Alternatively, Mr. Koya submitted that the Magistrate misdirected himself as to the legal nature of "possession". He submits that the inference drawn by the Magistrate that "the two accused were there for the purpose of dealing with all those goods" (i.e. the ones in the car and the ones in the cave) shows that the Magistrate equated a mere intention to deal in goods with actual possession. We are quite unable to interpret the judgment in this way, nor do we interpret it (as Mr. Koya also submitted we should) as a finding that the two accused were in possession of the goods *in the cave*. In our view the Magistrate was merely concerned to show that the arrival of the two accused at Bilo tended to show that they had some criminal connection with the goods in the case as well as the goods in the car. This was important as the goods in the cave represented the major proceeds of the burglary. We see no reason to assume that the Magistrate regarded the appellant as being in actual possession of goods other than those in the car, or that as regards the goods in the car he misdirected himself in any way as to the legal nature of possession.

Mr. Koya then submitted that as a matter of law there was no evidence on which the Magistrate could find that the goods in the car were stolen from Gokal's. In our view there clearly was such evidence because the

3 tape recorders and 7 cameras (although not identified by serial numbers, or the like but only as identical with goods stolen in the burglary) were found in association with the padlock. That the Magistrate was fully aware of the need for proper identification and also of the need to give the benefit of the doubt to an accused person who gives any reasonable explanation of his possession of stolen goods is manifest from the way (already mentioned in this judgment) in which he dealt with the case against the 6th accused. For all these reasons the second ground of appeal must also fail.

Ground (c)

We have dealt with this already insofar as Mr. Koya has sought to establish some error in law by inference from the Magistrate's conclusion that the two accused "were there for the purpose of dealing with all these goods". However, the Magistrate then went on to say "But it does not end there. The padlock from Gokal's was found in the car. I can see no possible defence for this."

We understood Mr. Koya to submit that these final words amounted to the enunciation of some novel and erroneous principle of law. We cannot so interpret them. They merely mean that in the Magistrate's factual assessment of the circumstantial evidence, the finding of the padlock was the final link which showed that the two accused were parties to the burglary itself rather than associated with the stolen goods in some other and less serious capacity (e.g. as receivers). No error of law is disclosed by this ground of appeal.

Ground (d)

We have already dealt with this (in relation to Ground (a)) insofar as it relates to the finding of a tape recorder at a plantation indicated by Aitcheson.

As regards the goods found in the appellant's own house, Mr. Koya made the somewhat startling submission that evidence as to the possession of goods cannot be given against an accused person unless he was a "free man" (i.e. not in police custody) at the time when the goods were found. He relied on the case of *Harris* 18 Cr. App. R. 157 and a note of *R. v Finn* in Vol. 22 *Journal of Criminal Law* p. 271.

Those cases, however, merely decided that in a prosecution for possessing house-breaking implements by night it is insufficent to prove possession by night at a time *after* the accused is in custody. The evidence must show (directly or by inference) that the accused had possession before he was taken into custody and at a time when it was "night" and not "day". We cannot see that they have any application to this present appeal. The finding of the 4 tape recorders in the locked tool shed raised some sort of inference that they had been put there by the appellant before he was taken into custody. The evidence was legally admissible. Its weight was entirely a matter for the Magistrate to determine.

For the reason which we have endeavoured to set out in this judgment, the appeal fails and is dismissed accordingly.

Appeal dismissed.