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**DIRECTOR OF PUBLIC PROSECUTIONS**

v.

**PITA KOROI**

B

[SUPREME COURT, 1977 (Mishra Ag. C. J.) 15th September]

Appellate Jurisdiction

C

*Criminal law—evidence and proof—recent possession—accused stopped and searched coming from dock and found in possession of two saris similar to those stored therein—whether sufficient evidence to support finding that saris stolen—Penal Code (Cap. 11) ss. 291(2) (c), 304(b)—Customs Ordinance ss. 33(1), 35.*

D

The accused was stopped and searched coming from Suva dock. Inside his handbag were found two saris similar to those stored in one of the dock warehouses. The magistrate dismissed the case considering that the prosecution had not proved that the saris had been stolen as no evidence had been adduced to show how many saris had originally been in the warehouse or to establish that two of them were missing.

Held on appeal by the Director of Public Prosecutions against acquittal:

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1. The accused had gone to the wharf with an empty bag. Later he was found with two saris in the bag having been into a warehouse where saris had been stored. This was evidence to support a finding that the saris were stolen. (*R. v. Burton* followed and applied).

2. The doctrine of recent possession and the accused's whole conduct and explanation could only lead to a finding of guilty.

Case referred to:

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*R. v. Burton* 169 E.R. 728.

Appeal by the Director of Public Prosecutions against acquittal in the Magistrates' Court of the accused on a charge of larceny from the dock.

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MISHRA Ag. C.J.: [15th September]—

The respondent was charged with larceny from the dock contrary to section 304(b) of the Penal Code. The particulars of the charge were in the following terms:

*“Particulars of Offence*

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PITA KOROI, on the 29th day of October 1975 at Suva in the Central Division, stole 2 saris valued at \$30.00 from Kings Wharf, adjacent to the Port of Suva, the property of Her Majesty's Customs Department.”

According to the evidence before the Court, the respondent left No. 4 shed inside the wharf area in the afternoon and went out through the south gate. He was

carrying a Qantas handbag. A security officer near the gate became suspicious and accosted him. In his evidence this officer said: A

“I told accused I wanted to see his handbag. Accused told me to wait until he returned from No. 4 shed. I took no notice but I just grabbed his bag and found 2 saris inside. Accused said that he did not know anything about the saris.”

When interviewed by the police the respondent said that he had brought his lunch in the Qantas bag and left it in No. 4 shed. After work he had picked the bag up on his way out and had no idea how the saris had come to be in it. B

No. 4 shed, according to the evidence, belong to Burns Philp Ltd. where the Company stores damaged goods. The shed is kept locked but the respondent, a delivery clerk, has a key to it. A number of saris had been stored in the shed at the relevant time but the person in charge who gave evidence for the prosecution could not say with certainty how many of them were there or if any were missing. C

The learned magistrate found the following facts established:

“It is not disputed that on the day in question the Accused was found in possession of two saris (Exhibit 2) as he was leaving the wharf in Suva. He was carrying them in a Qantas airline bag and was stopped and searched by P.W.1 a customs preventive officer.” D

He then went on to say:

“In this case I am in doubt whether the prosecution have proved that Exhibit 2 was stolen. The supervisor for B.P. in whose custody the goods in the wharf were could not identify Exhibit 2 as his or that he had anything similar to them in his custody. The police officer who inspected the shed from which accused allegedly removed Exhibit 2 says there were similar saris in there. But I do not think this goes far though since no evidence has been given that any saris were missing from there. In the face of the accused denial of involvement it would not seem difficult to show that the contents of the ‘dead house’ were so and so but in fact two saris were missing. It appears that no such records are kept and I would observe, obiter, that this encourages pilfering.” E

I am not satisfied that it has been shown beyond reasonable doubt that Exhibit 2 was stolen. That being so I do not have to decide whether it was shown that Exhibit 2 was the property of H.M. Customs.” F

The respondent was acquitted.

The Director of Public Prosecutions appeals against the order of acquittal on the following grounds: That the learned magistrate erred in: G

- “ (i) Concluding that the prosecution had failed to prove ownership of the property without considering ownership as alleged in the said charge.
- (ii) Failing to consider regulation 153 of the Customs Regulations in conjunction with the definition of ‘owner’ in the Customs Ordinance and section 291(2) (c) of the Penal Code. H
- (iii) Not considering the provisions of sections 31(a) and 35 of the Customs Ordinance.

- A (iv) Failing to draw the proper inferences from the recent possession of the property in the hands of the respondent.
- (v) Failing to consider the offence of receiving stolen property."

B Section 291(2) (c) of the Penal Code defines "owner" as including a "person having possession or control" of the goods concerned. Sections 33(1) and 35 of the Customs Ordinance make it clear that goods imported into Fiji remain in control of the Customs until removed by authority in accordance with the provisions of the Ordinance. In the instant case the saris in question were still in the wharf area awaiting removal, hence under the control of the Customs. The evidence clearly shows that their removal from the dock was unauthorised. The particulars of the offence themselves alleged that the saris, at the relevant time, were the property of the Customs Department who, in addition to having control over them, had, as collectors of customs duty, special property in them.

C The respondent neither had, nor claimed, any property in them.

D The learned magistrate, in any case, did not consider it necessary to consider the issue of ownership. He decided the case on the basis that the prosecution had failed to prove that saris had been stolen. It would seem that he considered it necessary for the prosecution to produce evidence of exactly how many saris there were in the warehouse prior to the theft and then to establish that two of them were missing. This, in my view, was a misdirection. As the learned author says in *Archbold* (36th Edn. para. 1526):

E "Although it is necessary to prove that the prosecutor's goods have been taken, that may be proved by circumstantial evidence, even if the witnesses for the prosecution cannot swear to the loss of the articles said to have been stolen, nor that the property found upon the prisoner and alleged to have been stolen is the prosecutor's."

F This is often the case in warehouse cases where property cannot be identified by the owner with certainty. In *R. v. Burton* (169 English Reports 728) the accused was seen coming out of a warehouse inside the London Docks. When stopped by a constable he took out a quantity of pepper and threw it on the floor. The witness for the prosecution could not say that any pepper had been stolen, or that any pepper had been missed. The accused did not claim the pepper to have been his own. It was held, on appeal, that the accused was rightly convicted of larceny. Maule J. said:

G "If a man go into the London Docks sober without means of getting drunk, and comes out of one of the cellars very drunk wherein are a million gallons of wine, I think that would be reasonable evidence that he had stolen some of the wine in that cellar though you could not prove that any wine was stolen or any wine was missed."

H The instant case would appear to be on all fours with the case of *Burton*. The respondent went into the wharf, and into No. 4 shed, with an empty Qantas bag with nothing but his lunch in it. In the afternoon when he came out of the wharf he had two saris in the bag in which he did not claim to have any property. In the absence of a satisfactory explanation, this, in my view would be sufficient evidence to support the finding that the saris were stolen.

His conduct when stopped, like that of Burton's, would do the rest. He pleaded with the Security Officer to be allowed to go back to shed No. 4 before he was searched. Why? The Security Officer quite rightly seized the bag. Inside were the two saris. The respondent then denied all knowledge of how they had come to be in his bag. **A**

This was clearly a case where the learned magistrate ought to have considered the doctrine of recent possession and, the respondent's whole conduct and explanation being so unsatisfactory, he should have found him guilty either of larceny or of receiving. I accept the learned Director of Public Prosecution's submission that under the circumstances of this case a finding of larceny would have been the correct finding. **B**

**I will, therefore, set aside the order of acquittal and in its place substitute an order of conviction of larceny from the dock contrary to section 304(b) of the Penal Code.** **C**

*Appeal allowed.*