SHIU CHARAN AND OTHERS

v.

REGINAM

[SUPREME COURT, 1965 (Hammett P.J.), 10th September, 25th November]

Appellate Jurisdiction

Criminal law—larceny—separate asportations charged in one count—whether prejudice or embarrassment caused—Penal Code (Cap. 8) ss.288(1),340(1)(a)—Criminal Procedure Code (Cap. 9) s.176(a),325(1).

The first two appellants were convicted of the larceny of certain timber and the third appellant was convicted of receiving the same knowing it to have been stolen. The theft of all of the timber was charged in one count but the evidence showed that the timber was taken and conveyed in two lorry-loads, one on the afternoon of Saturday the 3rd October 1964, and the other on the early morning of Sunday the 4th October. The quantity taken in each particular load was not established.

Held: 1. The evidence showed two separate asportations and not one continuing theft.

2. It was clear from the judgment of the magistrate that he had considered the facts of each taking seperately and there was no suggestion that he had utilised the facts in respect of one taking to bolster up either the corroboration of an accomplice or the guilt of the appellant in respect of the other taking.

3. There was no prejudice or embarrassment to any appellant and the proviso to section 325 (1) of the Criminal Procedure Code would be applied.

Cases referred to: *R. v. Seymour* [1954] 1 All E.R. 1006; 38 Cr.App. R.68: *R. v. Giddins* (1842) Car. & M.634; 174 E.R.667: *R. v. Ballysingh* (1953) 37 Cr.App.R.28: *R. v. Thompson* [1914] 2 K.B. 99; 9 Cr.App.R. 252: *Aguthu v. R.* [1962] E.A.69.

Appeal from conviction by a Magistrate's Court.

K. C. Ramrakha for the first and second appellants.

F. M. K. Sherani for the 3rd appellant.

G. N. Mishra for the Crown.

The facts sufficiently appear from the judgment.

HAMMETT P.J. : [25th November, 1965]—

The three appellants were charged with Larceny contrary to section 288 (1) of the Penal Code. The particulars of offence read :—

"SHIU CHARAN s/o Adhin, HIRA LAL s/o Ramphal and MOHAMMED ISTAFIR KHAN alias JOHNNY KHAN s/o Ilahi Buksh between the 3rd and 4th day of October 1964 at Suva in the Central Division stole 2,319 super feet of timber of the value of £222.13.10 the property of Burns Philp (S.S.) Company Limited."

The first and second appellants were convicted of Larceny as charged. The third appellant was convicted of receiving the property in the charge knowing it was stolen contrary to section 340 (a) of the Penal Code, under the enabling provisions of section 176 (a) of the Criminal Procedure Code which read :—

"176. When a person is charged with stealing anything and —

(a) it is proved that he received the thing knowing the same to have been stolen, he may be convicted of the offence of receiving although he was not charged with it;."

All three appellants have appealed against conviction on a number of different grounds, most of which were abandoned at the hearing of the appeal.

Counsel for the first and second appellants based their appeal on the following grounds:

"(1) That in effect, the evidence as such disclosed that Your Petitioners were guilty of two separate offences of larceny, whereas the charge laid alleged only such offence, and thereby the learned trial Magistrate erred in fact and in law on convicting Your Petitioners as charged.

"(2) The said charge as laid was bad for duplicity, inasmuch as the evidence adduced by the prosecution did not show any continuity between the two larcenies that is on the 3rd and 4th days of October 1964 respectively."

Counsel for the third appellant relied only on the following grounds:

"(1) That the evidence in support of the charge against your Petitioner has disclosed two separate and distinct takings, each of which could and should have been the subject of a separate count: your Petitioner should have been charged with separate offences and he has been prejudiced and embarrassed in this not having been done to the extent that it has occasioned a failure of justice.

(2) The evidence for the Prosecution relating to the incidents of the 4th October 1964 was as consistent with stealing as with receiving by your Petitioner and in the circumstances a count for stealing and a count for receiving ought to have been preferred against him. The learned trial Magistrate did not direct himself specifically to the said evidence and a substantial miscarriage of justice has thereby occurred."

The facts found by the learned trial Magistrate, which were not challenged, may be summarised briefly as follows :—

Messrs. Burns Philp (South Sea) Company Limited have a timber yard at Walu Bay, Suva, in which timber is stored. On Monday, 5th

October 1964, when the Manager of the timber yard came to work he noticed that some timber was missing. He checked his stock and found that over the weekend (i.e. since midday on Saturday 3rd October) 2,734 super feet of timber had been stolen from the yard. The Police were informed and began investigations immediately. The same day, i.e. on 5th October 1964, they recovered the majority of the missing timber on board the "Viani Princess" at Suva Wharf. It had been shipped by the third appellant and consigned to Labasa on the "Viani Princess" which was due to sail at 8.00 p.m. that evening.

It was proved at the trial that this timber had been stolen from the timber yard of Messrs. Burns Philp (South Sea) Company Limited by the first and second appellants and conveyed by them in a lorry, hired for this purpose, and delivered to the third appellant on the 3rd and 4th October, 1964. In fact the same lorry, driven by the same driver, made two trips in conveying this timber; the first on the afternoon of Saturday, 3rd October, and the second early in the morning of Sunday, 4th October 1964. It was not known to the Police how much timber was conveyed on each of these occasions. All the prosecution was able to prove was the total amount of timber stolen over the weekend covering the days of the 3rd and 4th October 1964.

At the trial, at the close of the case for the prosecution, counsel for the first and second appellants submitted that the charge was bad for duplicity because the evidence disclosed two separate takings — one on the 3rd October and one on the 4th October. He contended that there should therefore have been two distinct counts.

In reply the prosecutor submitted that the charge was not bad for duplicity but on the face of it perfectly in order. He further submitted that all the evidence given was admissible and that it was open to the Court on a charge of larceny of timber to the value of over £200, as in this case, to convict of larceny of a lesser quantity of timber say, even £10 worth, if the evidence showed this.

The learned trial Magistrate was of the opinion that the evidence before him disclosed a *prima facie* case of a continuing theft in which the taking and asportation were carried on over the period covered by the 3rd and 4th October 1964 as charged. He held that the charge was not bad for duplicity and that each of the accused did therefore have a case to answer.

The first and second appellants elected not to give evidence or to call witnesses. The third appellant did give evidence and called a witness in his defence. On an abundance of evidence the learned trial Magistrate held that the first and second appellants stole this timber and that the third appellant received it and that at the time he received it he knew that it had been stolen. There is no appeal against any of those findings.

The first ground of appeal of the first and second appellants and the first ground of appeal of third appellant cover the same point and complain that the evidence disclosed two separate offences and not one offence as was averred in the particulars of offence. It will be more convenient if I first deal with the other grounds of appeal and then consider that common ground.

The second ground of appeal of the first and second appellants complains that the charge is bad for duplicity. "Duplicity" in this respect means that in one charge more offences than one are disclosed and averred. As was conceded by counsel for the first and second appellants at the hearing of the appeal, this is not the position in this case. What is really complained of is set out in the first ground of appeal, namely that the evidence disclosed what counsel submits were two separate offences of larceny which should have been made the subject of separate charges. The charge is not, however, bad for duplicity on the face of it, because it contains only one charge of larceny.

The second ground of appeal of third appellant is that the evidence was as consistent with larceny as with receiving and in these circumstances alternative counts of larceny and receiving should have been laid. In support of this ground of appeal counsel relies on the decision of Lord Goddard C.J. in *R. v. Seymour* [1954] 1 All E.R. 1006 where the appellant had only been charged with receiving. The Court of Criminal Appeal considered that on the facts the appellant was not guilty of receiving but guilty of larceny, but as there was no alternative charge of larceny it was not open to the Court of Criminal Appeal to substitute a conviction of larceny. In those circumstances, the conviction of receiving was quashed. Lord Goddard commented that it was a pity that a man obviously guilty of larceny should escape the consequences of his crime because of the failure of the prosecution to charge him in the first place with alternative counts of larceny and receiving. He then expressed the view that in future in similar circumstances which arose in that case, the accused should be charged with both larceny and receiving in the alternative in order to avoid such a situation arising again.

It must be remembered that in England, as is the case in Fiji also, where a person is charged with receiving, and larceny is proved, it is not open to the Court to convict of receiving. In Fiji, however, express statutory authority is provided for a Court to convict of receiving where larceny only is charged under the provisions of section 176 (a) of the Criminal Procedure Code which are set out in full earlier in this Judgment.

The principles on which Seymour's case was founded do not therefore have altogether the same significance in Fiji as in England. The fact that the third appellant was charged with larceny alone did not in any way prejudice his defence. Being represented by counsel at his trial, the defence must have been fully aware of the express provisions of section 176 (a) of the Criminal Procedure Code.

I now turn to the first ground of appeal of all the appellants. The evidence disclosed two distinct occasions when timber was stolen — the first on the 3rd October 1964 and the second on the 4th October 1964. Whilst I appreciate the reasons given by the learned trial Magistrate in his careful and closely reasoned Judgment for his opinion that this constituted a continuing theft in which the asportation was carried on over a period of two days, I am unable to accept that view.

It is clear that the taking and carrying away of one single piece of timber from the pile in the timber yard would amount to larceny. It is arguable that each time a single piece of timber was taken from the pile in the timber yard and loaded onto the waiting lorry there was, technically speaking, a separate asportation which could have been the subject of a separate charge or separate counts in a charge. But it is well established that where several felonious acts, such as in this case, acts of larceny, are committed at the same time and all in one transaction, they may be charged in the same charge. (See *R. v. Giddins Car. & M.* 634). The continuous act of stealing all the pieces of timber stolen and removed on the first lorry load on 3rd October 1964 could therefore have been the proper subject of one charge or count of larceny.

It appears to me to be different, however, when there is a space of something like 12 hours or more, as is disclosed by the evidence in this case, between the theft of two separate lorry loads of timber, even though they were taken from the same place. In my view the taking on the 4th October was an entirely separate taking from that which took place on the 3rd October and they should therefore have each been made the subject of separate charges or separate counts in the same charge.

It first has to be considered whether the method of laying the charge in the particular circumstances of this case was a fatal defect in the proceedings.

In *R. v. Ballysingh* 37 Cr. App. R.28, the accused was charged in one count of the indictment of stealing a number of different articles in a store, i.e. shoplifting. The evidence showed that he had not stolen all the articles at the same time, and in the same place, but from different places in the same store on different occasions on the same day. Lord Goddard C.J. in his Judgment said the Court was of the opinion that, whilst technically, it would have been correct to make each article the subject of a seperate count, it was a defect that was not necessarily a fatal one. What had to be considered was whether there had been any prejudice or embarrassment to the defence. He relied on the words of Lord Isaacs C.J. in *R. v. Thompson* 9 Cr.App.R.252 to the same effect.

Reliance was placed by both counsel for the appellants on the decision of MacDuff J. (as he then was) in the case of *Agathu v. R.* [1962] E.A. 69. In that case the accused was charged with stealing 170 gunny bags between May 1961 and 29th August 1961. The evidence showed that 100 bags had been taken by the accused on 29th August 1961 and that at that date 170 bags were found to be missing. There was also evidence that on a previous occasion, some $2\frac{1}{2}$ months earlier, an unknown quantity of bags had been taken to the accused's house and it was presumed that these were the seventy sacks not accounted for.

In that case the Crown depended on the evidence of a driver who was hold to be an accomplice and there was a space of $2\frac{1}{2}$ months between the two larcenies. In the present case the driver was specifically held to be innocent of any complicity in the crime and not an accomplice. He was held to be a witness of truth. His evidence was,

however, in fact amply corroborated by another independent witness; further, the two takings occurred within a matter of 12 hours or so. It was pointed out, in Agathu's case, that the trial Magistrate should have directed his mind to each of the two takings separately, and insofar as he may have failed to do so, such failure had occasioned a miscarriage of justice. After citing a long passage from the judgment of the trial Magistrate, it was held :

> "From this it does appear that the magistrate has failed to consider the facts in respects of each taking separately and that he has utilised the facts in respect of one taking to bolster up either the corroboration of the driver or the guilt of the appellant in respect of the other taking. We are unable to say that had the learned magistrate not done so he must necessarily have reached the same conclusion in respect of each separate taking. Consequently we are unable to say that there had been no failure of justice with the result that, on this ground alone, the conviction cannot be allowed to stand."

When the present case is considered, it is clear from the Judgment of the learned trial Magistrate, that he did consider the facts in respect of each taking separately. Further, no question arises in this case of his having utilised the facts in respect of one taking to bolster up either the corroboration of an accomplice or the guilt of the appellant in respect of the other taking. If the two takings had been made the subject of separate counts in the same charge, as they could and should have been, the learned trial Magistrate would have been required to consider the evidence in support of each count separately. In his carefully prepared Judgment he did, in fact, review all the facts in respect of each taking quite separately and in just the same way as if there had been separate counts.

After examining the whole of the circumstances and giving them careful consideration, I am abundantly satisfied that no prejudice or embarrassment was occasioned by the charge being framed in this way. Being satisfied no substantial miscarriage of justice has occurred, I am of the opinion that this is a case in which the proviso to section 325 (1) of the Criminal Procedure Code should be applied.

For these reasons the appeal of each of the appellants is dismissed.

Appeals dismissed.