

A

## TIMOCI CAMA

v.

B

## THE STATE

[HIGH COURT—Palmer, J.—11 November 1988]

## Appellant Jurisdiction

C

*Criminal Law—Breaking, entering and larceny—appellant running on road near scene of crime—found in possession of stolen earring (stolen T.V. screen nearby)—said too drunk to know how he came into possession of earring—did not cross-examine or give evidence at trial—doctrine of recent possession does not impose duty to explain possession of stolen property—absence of explanation made inference of guilt less unsafe.*

D

**Appellant—In Person****J. Naigulevu for the Respondent.**

Appeal against his conviction by Timoci Cama of offences of House Breaking, Entering and Larceny contrary to s. 300(a) of the Penal Code. Cap. 17.

E

On 11 June, 1988 at Suva appellant broke and entered the dwelling house of Halima Bibi (Bibi) and stole therein a T.V. set valued at \$800 and a gold earring valued at \$10. He was convicted and sentenced to 3½ years imprisonment. There were 17 grounds of appeal involving protestations of innocence and a complaint that he did not have a fair trial.

F

A person called Kalivati came to Bibi's house demanding money. He threatened her with a broken bottle. She ran outside calling for help. Thereupon Kalivati and another man entered the house taking various things including a Video Screen and Jewellery including earrings. Kalivati escaped: the only question was if the appellant was the other man. Bibi's son could not identify the other man except that he was tall. A Police Constable (Semisi) came to the scene. On the way he saw two youths running, one of whom was the appellant. The police caught the appellant searched him and found jewellery including earrings in his pockets. He asked the appellant where he got it. There was no answer. Later in bush behind the house of Bibi's neighbour he found the Video Screen—the accused was drunk at the time.

G

Appellant was interviewed by Corporal Delailomaloma in the Fijian language. The interview was translated into English and tendered at the trial without objection.

H

The appellant said he was too drunk and did not know how the jewellery came to be in his pocket. Apparently he admitted being near the scene of the crime, seeing in two men arguing. One ran away (Kalidas alias Kalivati) who told the appellant to follow him. He did so until arrested by the police.

Asked about the alleged activities of Kalidas he replied, "I do not know". He agreed he had given a false name when arrested. When asked why he did not answer.

No witness except Constable Semisi identified the appellant.

The only ground of substance at the appeal was whether the identity of the accused had been established.

The Magistrate said—

"The accused, though not identified as one of the people entering the house, was found with the jewellery stolen. He comes clearly within the doctrine of recent possession of stolen items. He had a duty to explain how he got them. He had no explanations apart from saying that Constable Semisi is telling lies when he had said that they were found in his pocket."

The learned Judge of appeal observed that it was not the duty of the accused to explain how he obtained possession of the jewellery.

The Court said—

"The absence of any explanation in circumstances where the doctrine applies does make the inference of guilt from the prosecution evidence less unsafe than might otherwise possibly appear. This proposition was clearly laid down in Australia in *May v. O'Sullivan* 92 CLR 654 which has been followed on many occasions. In England it was said in *R. v. Aves* (1950) 34 Cr. App. R 159 that where the only evidence against the defendant is that he was in possession of recently stolen property the Court may infer guilty knowledge if the defendant has offered no explanation to account for his possession of the property. Similarly *R. v. Smythe* (1980) 72 Cr. App. R. 8. No doubt this was what the learned Magistrate had in mind when he made the above observation."

The Court also noted that appellant did not cross-examine (apart from putting that Semisi was lying). He did not give evidence or make a statement. The Magistrate was entitled to accept Semisi's evidence that he got the jewellery from appellant's possession. Direct evidence that the appellant raided the house was not necessary.

*Held:* The Magistrate was entitled to be satisfied beyond reasonable doubt of the guilt of the appellant.

Appeal against conviction and sentence dismissed.

Cases referred to:

- May v. O'Sullivan* 92 CLR 654
- R. v. Aves* (1950) 34 Cr. App. R. 159
- R. v. Smythe* (1980) 72 Cr. App. R. 8

PALMER J.:

## Judgment

A

This appellant was charged in the Magistrate's Court at Suva with House Breaking Entering and Larceny contrary to Section 300(a) of the Penal Code, Cap. 17 in that on the 11th day of June 1988 at Suva, he broke and entered the dwelling house of one Halima Bibi (d/o Mohammed) and stole therein one "Fisher" brand TV valued \$800.00 and one imitation gold carrying valued \$10.00 all to the total value of \$810.00 the property of the said Halima Bibi (d/o Mohammed).

B

He has filed a Petition of Appeal supplemented at the hearing and containing no less than 17 grounds. Most of these are protestations of his innocence and allegations that he did not have a fair trial. He appeals both against the conviction and the sentence of three and half years imprisonment imposed by the Magistrate's Court. I will refer to some specific grounds of Appeal presently.

C

**The reading of the records of the Magistrate's Court was made very difficult and occupied an unnecessary amount of time because the typed version attributes some of the evidence given by one witness to another witness. Research into the Magistrate's hand written notes reveals that some pages thereof had been transposed. This kind of thing does not assist the speedy disposal of these Appeals. There were some other unsatisfactory features of the trial but the matters which are crucial are clear enough so as to enable me to deal with the Appeal.**

D

Basically, there were two episodes of this crime to at least one of which the appellant was clearly a party. The first Prosecution Witness, Halima Bibi stated that after 4.00 p.m. on the 11th of June 1988 she was at her home at Tulele Place. A person came to her house asking for money. From the evidence this person was clearly not the accused. He was identified as one Kalivati but apparently escaped and has not been apprehended. She told him to wait and that she would get some money from inside. He took a broken bottle from his pocket and threatened her with it. She ran outside and called her son who was on the road. Kalivati and another man then entered the house, broke down the kitchen door and took out all clothes, an umbrella, a Video Screen and Jewellery consisting of gold ring and earrings, two rings and a chain pendant. The only real question is whether the appellant was that other man.

E

The complainant's son, one Nashib Khan said that when his mother called out to him he ran to the home where he saw Kalivati who had a kitchen knife with him. He took a cane knife to defend himself and told Kalivati to leave or he would strike him with the knife. Kalivati left. A little later Kalivati came back with another man. They smashed the back kitchen door.

F

The other man:

G

"Was a tall person like accused. I saw from back. I cannot positively identify accused."

H

Constable Semisi gave evidence. He said he got the report of the House Breaking and attended the scene with two other officers. On arrival at the scene he saw a man on the road who had been stabbed with a knife and he was taken to Hospital. He saw two youths running from the side of Tulele side road at the junction of Tulele Place and MacFurlane Road. The accused was one of those two. The officers followed them on foot and caught them at Madam's Place which is nearby. He searched the accused and found some jewellery in his pocket. He asked him where he got it

from. The accused gave no answer. The jewellery included earrings, chains, rings and a chain pendant. Later in the bush behind the complainant's neighbour's house he found the Video Screen. The accused was drunk at the time of arrest and was arrested for House Breaking Entering and Larceny concerning the properties identified and tendered in Court. The man Kalivati ran away and has not been found.

Cpl. Josefa Delailomaloma said he was the Investigating Officer and interviewed the accused in Fijian language under caution and translated his statement into English. This statement was tendered without objection from the accused. The accused told him he was too drunk and he did not know how the jewellery came into his pocket. In his statement the appellant said he understood what he was being questioned about. He said he was drinking beer with Kalidas and some others. At about after 4.00 p.m. he came down to the Leys Road and saw two men arguing, one of whom had a knife, when he saw Kalidas running down. Kalidas told him to follow him and the accused then ran and followed him from there until he was arrested by the Police. He said he did not know why he was arrested. He was very drunk. He was asked:

"When you were arrested by Police, some of these imitation jewellerys were found in your possession. Where did you get them?"

Ans: "I don't even know as to how come it was found in my possession."

It was put to him that these jewellerys were stolen from the house of Halima Bibi and he was asked as to what he has to say. He said, "I don't know." It was put to him that Kalivati alias Kalidas went to the house of Halima Bibi, threatened her to give some money and later entered and stole a Video Screen and the imitation gold jewellerys and ran away until arrested. He said, "I don't know." It was put to him that the main reason he was arrested was because he was seen with Kalidas running away from the house and later when recaptured was found in possession of the stolen items. He said, "I don't know anything about that." He agreed that he had given to the Police a false name when arrested, and asked why he did this, did not answer. When the principal allegation was put to him, once again, he said:

"At that time, I did not know what I was doing as I was drunk."

He was asked if there was anything else he wanted to tell the Officer, he said: "No." He certified that the interview had been read out to him in Fijian and that he was told he could add or correct anything he wished.

The only ground of Appeal of any substance is a complaint that the identity of the accused had not been established. True it is that no witness identified the accused, except Constable Semisi, as the person he arrested. The learned Magistrate in his judgment stated that:

"The accused, though not identified as one of the people entering the house, was found with the jewellery stolen. He comes clearly within the doctrine of recent possession of stolen items. He had a duty to explain how he got them. He had no explanations apart from saying that Constable Semisi is telling lies when he had said that they were found in his pocket."

the absence of any explanation in circumstances where the doctrine applies does make the inference of guilt from the prosecution evidence less unsafe than might otherwise possibly appear. This proposition was clearly laid down in Australia in *May v. O'Sullivan* 92 CLR 654 which has been followed on many occasions. In England it was said in *R. v. Aves* (1950) 34 Cr. App. R. 159 that where the only evidence against the defendant is that he was in possession of recently stolen property the Court may infer guilty knowledge if

A the defendant has offered no explanation to account for his possession of the property. Similarly *R. v. Smythe* (1980) 72 Cr. App. R. 8. No doubt this was what the learned Magistrate had in mind when he made the above observation.

I am of the view that the learned Magistrate was correct in applying the doctrine of recent possession of stolen items. In this case the appellant was found in possession of some of the stolen items in just about the closest proximity in time and place. He was running away from the scene of the crime together with another man who was clearly identified as having been on the scene. Apart from putting that Constable Semisi was lying, the appellant did not cross-examine, and when called upon elected to neither call nor give evidence nor make a statement. In those circumstances the learned Magistrate was entitled to accept Constable Semisi's evidence that he got the jewellery, which was identified by the owner, out of the appellant's pocket. On those facts a direct identification of the appellant as one of the two persons who had raided the house was not necessary, and the learned Magistrate could be satisfied beyond reasonable doubt, as he expressed himself to be, of the guilt of the accused both as to the House Breaking Entering and Larceny of the carrying as well as that of the TV Screen which was taken on the same occasion.

D Another ground of Appeal is that the Defendant "was denied the right to elect for his trial." This may be shortly disposed of by reference to the Electable Offences Decree (No. 22) which makes it plain that there is no right to election in respect of the offence charged.

A further ground of Appeal is—

"that the Defendant be given a chance to prove in Court that he is innocent and seeking fair trial and justice."

E This may be equally shortly answered by stating that he was given that opportunity in the lower Court and did not avail himself of it. The Appeal against conviction is therefore dismissed.

The Appellant also appeals against sentence on the grounds that it is too harsh and severe. The Appellant has a truly horrible record going back to 1979. He has a total of 50 convictions, of which no less than 38 are for House Breaking Entering and Larceny, Burglary, Robbery or Theft. Of the others, six are for Escaping from Lawful Custody and others are for Act with Intent To Cause Grievous Bodily harm, Damaging Property, Giving False Names, and others. He has imposed on him a large number of terms of imprisonment including several of three years and one for three and half years in 1982. So it is perfectly plain that he has not learnt anything from his long periods of imprisonment and has failed to grasp the connection between committing crimes and the consequences thereof. In those circumstances, I am not prepared to say that the sentence of 3 years and 6 months is excessive, and the Appeal against sentence is accordingly dismissed.

*Appeal dismissed.*