MANUAO (LEILUA) v POLICE

Supreme Court Apia
6 August 1979
Nicholson CJ

CRIMINAL LAW (Evidence) - Evidence in other cases (Inadmissibility) - On the trial of a charge of receiving stolen property, to wit, two drums of oil, the only evidence for the prosecution that the property was stolen was that of a witness convicted by the same Magistrate of stealing two drums of oil at a previous trial, who admitted such conviction on being questioned by the Magistrate. It is a fundamental principle that a Magistrate must act only on the evidence properly before him and not on evidence gained in other cases which the accused has no opportunity to test: Robinson v R 2 PD 75. While the Magistrate was entitled to take judicial notice of a previous conviction of the witness it was not conclusive evidence of his guilt and certainly not evidence of the guilt of another in a separate trial: Jorgensen v News Media (Auckland) Limited [1969] NZLR 961, and cf., Hollington v Hewthorn [1943] 1 KB 587, [1943] 2 All ER 35 where such evidence was rejected. Accordingly, since the circumstances of delivery of the two drums of oil to the accused while suspicious were insufficient to prove beyond a reasonable doubt that the two drums of oil were stolen the prosecution had failed to discharge the burden of proving the offence charged: R v Sbarra (1918) 87 LJKB 1003 considered and applied.

GENERAL APPEAL against conviction of receiving stolen property contrary to s 90(1)(d) of the Crimes Ordinance 1961 as amended by s 8(d) of the Crimes Amendment Act 1961.

Conviction and fine quashed.

Retzlaff for appellant.
Sapolu for respondent.

NICHOLSON CJ. This is an appeal against a conviction for receiving stolen property contrary to section 90(1)(d) of the Crimes Ordinance 1961 as amended by section 8(d) of the Crimes Amendment Act 1961, entered against the appellant in the Magistrate's Court at Apia on 6th July, 1979.

The prosecution evidence consisted of the testimony of two witnesses only. The first one, Joe Hoeflich, was the alleged thief of two drums of oil, and he and the second witness, Oleva, described the delivery of two drums of oil to the home of the accused at Savai'i one evening in November, 1978. These two men were in the company of one Lemapu and were then employed by the Public Works Department on pump maintenance work. Joe explained that he had collected two drums of oil from the Public Works Department and two drums belonging to the accused. The accused had left these two drums at Joe's home to bring over to Savai'i for him on his next trip. When Oleva boarded the pick-up to go to Savai'i the four drums were already loaded and Joe explained to

him that two of the drums were the accused's property.

The accused gave evidence that supported the evidence of Joe as to the two drums being his own property, relating how he had purchased these drums from Mobil Company in Apia. He could produce no receipts for the purchase.

In the course of the hearing, Joe admitted under questioning from the learned Magistrate that he had been convicted of theft of two drums of oil on 25th June, 1979 and that Lemapu had been his co-defendant. At the conclusion of the prosecution case, counsel for the defence submitted that there was no case to answer since there was no evidence that the two drums of oil were stolen. The learned Magistrate rejected the submission, and made the following observation in doing so. "I have already found Joe Hoeflich, together with Pepa, to have stolen the two drums of oil as supplied to the defendant Leilua therefore stolen property. Anyway, I hold that there is direct evidence to show that 4 x 44 drums were taken to Savai'i, and in the circumstances it is reasonable to infer that these were all Government property." The learned Magistrate then referred to circumstantial evidence indicating the accused's knowledge that the drums were stolen. In his judgment, after rejecting the accused's and part of Joe's evidence, the learned Magistrate drew inferences from the evidence that the drums of oil were Government property, had been stolen by Joe and Lemapu, and that the circumstances of the delivery to the accused's place established both that the drums were stolen and that accused knew they were stolen.

It is axiomatic that, to establish a charge of receiving stolen property, the prosecution must prove three ingredients:-

(a) possession of the article in question;
(b) that the article was in fact stolen; and
(c) that the accused had guilty knowledge.

This appeal is directed to the second ingredient, and clearly there is an unusual paucity of evidence on this point. The Court is entitled to expect cogent evidence showing that the drums in question were in fact stolen property, whether stolen from Government or anyone else, in charges of this nature, but such was not the case here. In fact the whole prosecution of this quite important case appears to have been handled in an unsatisfactory manner, which I ask counsel for the respondent to draw to the attention of the Commissioner of Police.

I concluded at the hearing of this appeal that it must succeed and I now proceed to give my reasons for that conclusion.

To begin with, it is elementary that the Court may only proceed on the evidence placed before it in the particular case. The learned Magistrate in his first ruling clearly relied upon information he had obtained during another hearing to reach the conclusion that there was prima facie evidence that the drums were stolen property. Also, it seems likely that he used that same information in directing questions to the alleged thief regarding his conviction for theft of drums.

Counsel for the respondent argues that the Court is entitled to take judicial notice of the witness's previous conviction, and referred to the decision of the New Zealand Court of Appeal in Jorgensen v. News Media (Auckland) Limited [1969] NZLR 961, which held that a certificate of conviction for murder was admissible evidence in a civil trial, but was not conclusive evidence of guilt. Whether such evidence discharged the burden of proof required was for the trial judge to decide. This decision expressly differed from that of the English Court of Appeal in Hollington v. Hewthorn [1943] 1 K.B. 587, [1943] 2 All E.R. 35, where such evidence was rejected.

It will be noted that the several authorities discussed in Jorgensen's case as well as that case itself, involved civil proceedings in which the person previously convicted was a party. That is a quite different situation from the instant case where the fact of conviction of a witness is purported to be used to establish a criminal charge against another person in a separate trial.

In receiving trials it is a common practice to call the original thief as a prosecution witness and to adduce evidence that he had been

convicted and punished for the theft. But such evidence is not to be admitted for the purpose of proving that the article in question is stolen property, but merely to disclose to the Court the status of the witness to aid the Court in assessing his credibility. The basic principle which appears to be spelled out in Robinson v. R. 2 P.D. 75, (a report which is not available to me), is that a judge may not act upon information gained in other cases, and he must restrict himself to the evidence properly before him.

The learned Magistrate, I conclude, relied upon his knowledge of the previous proceedings against Joe Hoeflich in arriving at a finding on an essential ingredient of the charge against the accused. He thus acted upon evidence or information which the accused was given no opportunity to test in the course of the prosecution against him, a clear breach of fundamental principle.

However, I must now consider the possibility that the circumstances of the receiving may themselves have been sufficient evidence that the drums were stolen. The drums were delivered as it was getting dark, the use of Government transport for this private purpose was obviously improper, and it seemed unusual for the purchase to have been made by accused in Apia when he could have bought oil on Savai'i from Asau.

In R v Sbarra (1918) 87 LJKB 1003 the English Court of Criminal Appeal held that the circumstances in which a defendant receives goods may of themselves prove that the goods were stolen. But, in my view, the circumstances here were not such as to raise the inference even prima facie, much less beyond reasonable doubt, that the two drums were stolen. The circumstances were suspicious, but the evidence takes it no further than that.

I further find from the evidence as a whole that there was no testimony to contradict the explanation given by Joe Hoeflich and the accused as to his claimed ownership of the drums. The learned Magistrate commented on the accused's inability to produce receipts, but the onus was on the prosecution to prove by records and witnesses that the property was stolen. There is no onus on the accused to prove himself innocent.

I find that there was insufficient evidence to warrant the learned Magistrate's finding that the drums in question were stolen. Therefore, the conviction for receiving stolen property cannot stand. The conviction and fine are quashed.

I should add for the guidance of the Magistrates that in a situation such as this, it is highly desirable that different Magistrates hear the theft and receiving charges relating to the same property, although it is appreciated that it is not always possible to arrange this.