

E.D. Smith Vs. Emperor

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Court : Chennai

Decided On : Nov-08-1917

Reported in : AIR1918Mad111; 43Ind.Cas.605

Judge : William Ayling and ;Phillips, JJ.

Appellant : E.D. Smith

Respondent : Emperor

Judgement :

William Ayling, J.

1. This is an appeal by Mr. E.D. Smith, a tailor doing business in the Mount Road, Madras, against a conviction by the Chief Presidency Magistrate for dishonest possession of stolen property under Section 411 of the Indian Penal Code. The property consists of various articles (Material Objects Nos. 1 to 6 and 9) alleged by the prosecution to have been stolen from the Army Clothing Factory situated close to accused's premises. The facts are fully set forth in the judgment of the Chief Presidency Magistrate and it is unnecessary to recapitulate them here.

2. In support of the conviction the Chief Presidency Magistrate has largely relied on certain statements made by accused at the time of the search of his shop to Captain Phillips, an officer of the Army Clothing Department examined as second prosecution witness. On behalf of accused it was argued by Mr. Grant in both

Courts that these statements are confessions and that their admission in evidence is barred by Sections 24 and 26 of the Indian Evidence Act. The Chief Presidency Magistrate has held that they are not confessions within the meaning of these sections and it seems convenient to dispose of , the question of the admissibility of this evidence before proceeding further.

3. The statements relate to 88 flannel shirts (Material Object No. 1) which were seized in accused's brougham near Neill's statue and to 20 bales of canvas (Material Object No. 6) which were found in a well at the back of his shop. They were made privately to Captain Phillips at about 4 P.M. in the cutting room while the search of the shop was still incomplete. The conversation began by Captain Phillips saying to accused: Smith, make a clean breast of it; I want to get hold of the men in the factory. 'On this accused told him that he had got the shirts from two tailors employed in the Army Clothing Factory for 8 annas each, and apparently being pressed to give names and particulars said: 'if I do, I shall implicate clerks, Muhammadans and guard peons.' On being questioned as regards the canvas bales (Material Object No. 6) accused asked Captain Phillips if he had never had thefts reported to him from the Salt Cotaurs. Accused added 'that is where that material came from,' and said he purchased it a piece or two at a time and intended selling it to some upcountry Rajah.

4. Now it seems to me that these statements regarding Material Object No. 1 as well as Material Object No. 6 are incriminatory statements, implying not only that the property was stolen property but that accused knew it to be such at the time of acquisition. He says he purchased the shirts from two tailors in the factory for what appears to be quarter of their cost price: and his reference to implicating people disposes of any suggestion that he thought the tailors were entitled to thus dispose of the shirts, if indeed such a contention could be seriously set up. As regards the canvas, there is a definite admission that the stuff was stolen property belonging to the Army Clothing 'Factory. By the Salt Cotaurs, the main goods depot of the Madras and Southern Maharashtra Railway is referred to; and the meaning is that the bales were stolen there from. Accused's words to Captain Phillips, 'Have you never had thefts reported to you from the Salt Cotaurs', show that they were the property of the Army Clothing Factory and of no other owner.

5. I cannot follow the Chief Presidency Magistrate in his view that these simply are explanatory statements. As already stated, they are highly incriminatory: and as he himself says in introducing them, have an important bearing on the case. In fact towards the close of his judgment he says the case against accused is doubly proved' when we consider accused's statement to second prosecution witness that he bought the shirts for 8-annas each from two tailors in the Army Clothing Factory. Accused must have known that he had no right to buy shirts from the Army Clothing Factory tailors. The Magistrate's view can only be based on the idea that nothing is a confession' within the meaning of the Evidence Act which does not amount to a full and explicit admission of guilt--so clear as to leave no other hypothesis tenable. This view or something very like it has in fact been put forward by Mr. Barton in support of the conviction. For authority to the contrary I need only refer to *Imperatrix v. Pandharinath* 6 B. 34 : 3 Ind. Dec. 479 and *Queen Empress v. Nana* 14 B. 260 : 7 Ind. Dec. 632.

6. Taking it, then, that these statements are confessions, are they rendered inadmissible in evidence by the provisions of Sections 24 and 26 of the Indian Evidence Act Section 24 runs thus: 'A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat, or promise, having reference to the charge against the accused person, proceeding from a person in authority, and sufficient in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him' Captain Phillips has given his evidence regarding these confessions in the most candid and straightforward manner: 'and the effect is to leave no doubt whatever in my mind that the making of them was immediately preceded by an intimation on his part, which accused would naturally interpret as reasonable grounds for supposing that by making them he would gain an advantage of a temporal nature in reference to the proceedings against him. Both Captain Phillip's words and, as he says, his tone implied that he 'was after the men in the factory' and not after accused. He says 'I took it that accused would be highly interested in bringing the hands to light for his own good. I intended to convey to Smith the impression that by my adopting this friendly attitude it would

be for his own good to make a disclosure to assist me.' Of course he adds: I had no intention of leading accused to believe that he would get off free. It was my impression that accused, if he made a clean breast of it, would get off easier than he would otherwise."

7. I think the effect of all this, the impression which this witness intended to convey (and doubtless did convey) to accused was that he (witness) was chiefly anxious to run in the men in the factory: and that if accused assisted him in this respect, he would be let off light, if he did not escape prosecution altogether. This intimation was conveyed as the witness says at the outset of the conversation: and I can only regard it as the cause of the confessional statements which followed.

8. It is objected (1) that Smith was not an accused person at the time he made the statements, (2) that Captain Phillips was not a person in authority and that accused had no reasonable ground for believing that his assurances were worth anything. As regards (1) Mr. Barton argues, that no one is an accused person within the meaning of this section until a formal complaint, information or charge has been made against him. I should be inclined myself to hold that the phrase 'accused person' in this connection included any one who subsequently became accused, provided that at the time of making the statement, criminal proceedings were in prospect (otherwise an inducement regarding them could not be held out). To limit it in the manner suggested would obviously rob the section of much of its protective effect. But, how ever this may be, there can be no doubt that accused in the present case stood in precisely the same position as if the Police proceedings by way of search had been preceded by a formal complaint. Some of his property, the shirts in the brougham, had already been seized, he had been brought from the Police station to the shop in the Deputy Commissioner's car and his shop was in process of being searched for other property, which he was perfectly aware was alleged to have been stolen from the Army Clothing Factory.

9. Then as regards the position of Captain Phillips, Mr. Barton in his argument represents him as a mere underling, a master tailor, whose word could carry no weight with accused, and who could not be regarded as a person in authority. 'I cannot accept this view. There is little or no evidence as to his exact position in the

factory, but he is a Commissioned Officer who was on the spot representing the Army Clothing Department--the potential prosecutor in the case, and who was telephoned for by the Police as soon as the brougham and its contents were seized. He certainly spoke as one in authority to Smith and also in the witness-box. He said to Smith. I want to get hold of the men in the factory, and implied that Smith would gain by assisting me.' In cases such as these it is always an open question, whether the person in possession of the property will be prosecuted as well as the thieves and Smith could not have failed to attach great weight to any indication of policy made by such an officer.

10. The expression person in authority has, I think, always been widely interpreted. Vide Woodroffe and Amir Ali's Law of Evidence, 6th Edition, page 258, and Taylor on Evidence, 10th Edition, page 614, The rule is the same in India as in England, where it has been held to include not only the prosecutor, but also the wife of the prosecutor, or one of the prosecutors and even, in some circumstances, relations of the same: vide, R. v. Warringham 2 Den C.C. 447 N : 15 Jur. 318 and R. v. Taylor 8 C. & P. 733. An attorney engaged in an endeavour to get up a prosecution has also been treated as a person in authority, vide, R. v. Croydon 2 Cox. C.C.67.

11. For authority in India I may refer to the remarks of Sargent, C.J., in Reg. v. Navroji Dadabhai 9 B.H.C.R. 358. He says: 'The test would seem to be had the person authority to interfere with the matter; and any concern or interest in it would appear to be held sufficient to give him that authority.' I think the position of Captain Phillips in the present case satisfies this test--certainly as much as that of the auditor under consideration in that case.

12. Mr. Barton has quoted, on the other side, Emperor v. Mahamadbuksh Karimbuksh 8 Bom L.R. 507 : 4 Cri. L.J. 49, but in that case the person offering the inducement, while the superior officer of the accused, had absolutely nothing to do with the proceedings against them ; and it was on this very ground that the confession was admitted.

13. I must, therefore, hold that accused's statements are irrelevant under Section 24 of the Indian Evidence Act and must be altogether excluded from consideration

in the case. Whether they are also excluded by Section 26 will depend on whether accused should be regarded as in custody at the time he made them. The Chief Presidency Magistrate has held that he should and there is much to be said for this point of view, though for my purpose it is unnecessary to decide the question.

14. It remains to consider whether apart from these confessional statements there is sufficient evidence to support the conviction.

15. Mr. Grant's chief contention in respect of all the property is that the prosecution has failed to prove that it is stolen property ; and this, if established, of course goes to the root of the case. The question has to be considered with reference to each of the various articles or groups of articles: and it is convenient to begin with Material Object No. 1, the 83 shirts which were seized out of the brougham after leaving accused's shop. Possession of these shirts is not denied by accused.

16. These shirts are all marked with abroad arrow, the letter M' for Madras and a number, and it is not denied that 20,000 shirts of an identical quality, description and mark were made in or for the Madras Army Clothing Factory between March 1917 and 17th July 1917, when the last supply was delivered into store. The seizure from accused was on 31st July 1917 and a stock-taking finished on 10th August 1917 revealed a shortage of 101 shirts in the Army Clothing Factory stock. As no shirts have been disposed of by sale from the factory (vide prosecution witness No. 1), it seems to follow that the said 101 shirts must have been stolen and according to the prosecution, the 88 shirts forming Material Object No. 1, were part of them. A good deal has been said as to the value of the broad arrow mark as evidence. It is admitted that Government property marked with the broad arrow is occasionally sold to the public without the broad arrow mark being obliterated (vide prosecution witness No. 2), and it must be conceded that this practice deprives the broad arrow mark of a significance which would otherwise be claimed for it. It is still evidence that the article stamped with it was at sometime the Government property: but it is not evidence that possession was transferred to an outsider by theft or criminal misappropriation. In the present case there can, I think, be no doubt that the 88 shirts seized were originally made for the Madras Army Clothing Factory, and formed part of that factory stock. The question is

whether they formed part of the 101 shirts shown to have been stolen. The only alternative theory which has been or, I think, can be suggested is that they formed part of one of three consignments despatched to Jhansi, Bombay and Poona respectively on 10th April 1917, 17th April 1917 and 14th May 1917. The fact of these consignments appears from the ledger Exhibit I and they are shown as sent to the O.I.C. supplies, Jhansi, the Superintendent Army Clothing Factory, Bombay, and as 'supply reserved, Poona.' No attempt seems to have been made by the defence to develop this point, by indicating what possibility existed of any of the consignments having got on the market without theft. It was elicited from Captain Phillips in a general way that articles for which the department have no use are sometimes sold to the public, and he also refers to a regimental sale by a quartermaster and individual sale by a soldier. The last named would presumably be a dishonest misappropriation. But no reason is suggested why new flannel shirts should be disposed of by authority within so short a time of their issue: and after careful consideration it seems to me that the possibility of the 88 shirts seized from accused having been obtained in this way is so slight that a reasonable man would disregard it. We have on the one hand the fact that a larger number of shirts of identical description had been stolen from a factory within a few yards of accused's shop. On the other hand we have the bare possibility that shirts to this number may have been legitimately disposed of in such distant places as those mentioned and found their way into accused's possession. No indication is given of how this may have occurred and accused has, apart from the excluded confessions, attempted no explanation of how he came by the shirts. No doubt an accused person is always entitled to hold his tongue; but where the only alternative theory to his guilt is a remote possibility, which if correct, he is in a position to explain, the absence of any explanation must be considered in determining whether the possibility should be disregarded or taken into account. The provisions of Sections 100 and 114 of the Indian Evidence Act are not without bearing on this point.

17. I think the evidence justifies the inference that the shirts seized formed part of the 101 shirts stolen from the Army Clothing Factory.

18. The next question is whether accused had reason to believe it to be stolen property, Mr. Grant argues that it is not shown that the theft of the shirts occurred

recently before their seizure from accused's possession and, therefore, the principle of Section 114 of the Indian Evidence Act, Illustration (a), has no application. The shirts may, it is said, have been stolen at any time after 6th March 1917, when the first consignment was received in the factory; so that it cannot be said that accused was in possession 'soon after the theft', to quote the words of the Illustration. I do not think this argument carries much weight. The Illustration is only an example of the manner in which inferences can be drawn from the common course of events, human conduct, etc., and while the lapse of time is usually an important factor, the importance to be attached to it must vary with the circumstances of the individual case, and will depend largely on the frequency with which the property is likely to have changed hands. The wording of the Illustration must not be read as limiting the application of the section to which it is attached. In the present case all that can be said is that the theft of the shirts may have occurred at any time from March to July. That is no sufficient reason for refusing to draw the usual inference. Mr. Grant has referred to two cases in which the lapse of time has been considered as a reason for refusing to require explanation [Queen-Empress v. Burke 6 A. 224 : 55 A.W.N. (1884) : 3 Ind. Dec. 832 and District Magistrate of Bellary v. Cbbava 16 Ind. Cas. 164 : (1912) M.W.N. 529 : 13 Cri. L.J. 596], but in both cases this was only one of several reasons for acquittal and I am not aware of any case in which a maximum period has been suggested beyond which no inference of guilt can be drawn.

19. The shirts, therefore, being stolen property and seized from accused's possession within what may be considered a reasonably short time after they must have been stolen, there is no reason why, in the absence of any attempt to explain his possession (apart from the excluded confessional statement) the usual inference should not be drawn against accused. There is no need to strain against the accused the curious circumstances in which the shirts were being taken from his shop in a closed brougham (I accept the evidence of prosecution witness No. 7 in this respect) but they certainly tend to suggest guilty knowledge.

20. I consider that in respect of these articles the conviction is justified.

21. [His Lordship then discussed the evidence as to the possession of the Khaki shirts in pieces and the bales of cloth and concluded:]

22. I find it impossible not to hold accused responsible both for the presence of the property in his shop and its concealment and the latter is so entirely incompatible with honest possession, that I think it justifies his conviction.

23. I do not propose to deal with the case of the other articles, Material Objects Nos. 2-5. These were found in accused's shop with no attempt at concealment: and Material Objects Nos. 2 and 4 were even pointed out by accused himself. The case regarding them is much weaker than as regards the other articles dealt with above, and as I have found the charge established in relation to the latter it is unnecessary to proceed further.

24. In the result, I would confirm the conviction and sentence and dismiss the appeal.

Phillips, J.

25. The accused E. D. Smith, a tailor in the Mount Road, has been convicted under Section 411 of the Indian Penal Code for retaining stolen property. The facts are briefly as follows. On the 31st July 1917, accountable was posted to watch Smith's shop and saw a brougham drive up. Certain bundles were placed inside and the brougham drove down the Mount Road, The constable ran after the carriage and stopped it, and it was taken to the Police station opposite Spencer's Buildings. The Deputy Commissioner of Police and the Inspector, prosecution thirteenth witness, were telephoned for and came and also second prosecution witness, Captain Phillips, master tailor of the Army Clothing Factory. The carriage was examined and in it were found 8; shirts which have been identified as shirts belonging to the Army Clothing Factory. The accused came to the police station, and from there the whole party went to the accused's shop which was searched and in that search various articles, which are said to-belong to the Army Clothing Factory, were found, Material Objects Nos. 2 to 9. These articles consisted of various pieces of cloth and articles of clothing. The evidence in regard to the various articles is that they belonged to the Army Clothing Factory and were

removed from there by theft or criminal misappropriation. On these facts, the accused has been charged.

26. [His Lordship then discussed the evidence.]

27. The next question for consideration is whether the accused was in possession of the articles knowing them to be stolen. The fact that they were found in his carriage and in his shop is not disputed and we have the statement of the accused as regards their possession. This statement is objected to as being a confession and, therefore, inadmissible in evidence under Sections 24, 25 and 26 of the Indian Evidence Act. The statement was made to Captain Phillips in the cutting room of the accused's shop after the search had been made. Captain Phillips said to accused, 'Smith, make a clean breast of it. I want to get hold of the men in factory'. Smith said, 'if I do I will implicate clerks, Muhammadans and guard peons,' and also in answer to a question as to where he got Material Object No. 6, the accused asked Captain Phillips if he never had thefts reported to him from Salt Cotaurs and said that was where that material came from. He said he purchased a piece or two at a time and intended selling it to same upcountry Raja. With regard to shorts Material Object No. 9 he said he had bought one or two here and there from different men. The question is whether this statement amounts to confession. There is no definition of confession in the Evidence Act, but I take it that it must be something more than a mere admission. In *Queen-Empress v. Nana* 14 B. 260 : 7 Ind. Dec. 632 statements were held to be a confession on the ground that they suggested the inference that the prisoner committed the crime. In *Imperatrix v. Pandharinath* 6 B. 34 : 3 Ind. Dec. 479 it was held that an admission of a criminalizing circumstance on which the prosecution mainly relies and forming the important part of the evidence against the accused, as showing that he did not come by the property honestly, would come properly within the rule of exclusion in regard to confessions made by a person in the custody of the Police. In *Emperor v. Kangal Mali* 26 Ind. Cas. 161, 15 Cri. L.J. 713 : 41 C. 601, when dealing with the admissibility of statements, it was said that a useful test was to ascertain the purpose to which they were put by the prosecution. If the prosecution relies on the statements of the accused as being true, then they may and probably in many cases would be found to amount to confessions. Accepting both these

propositions I would add that in order to make a statement a confession, it appears to me to be necessary that the inference as to the criminality of the person making the statement should be gathered from the statement itself, for I think it is quite possible that in many cases a statement which by itself does not contain any inference of criminality may in the light of subsequent events or of subsequent evidence strongly support such an inference. If the statement in itself is not incriminating, I am doubtful whether the fact that it does become incriminating owing to subsequent events would make it a confession. A statement may be such as is compatible either with the innocence or guilt of the person making it and if subsequent events show that it leads to an inference of guilt, I do not think that it could necessarily be a confession if it is originally of such a nature that a different series of subsequent events would show it to be not only compatible with, but also evidence of, the innocence of the accused, I do not think it is necessary in this case to labour this point, for if we take the statements as a whole, I think there can be no doubt that they do lead to an inference of criminality without any additional evidence. The statement of the accused that if he made a clean breast of it, he would implicate several other men goes to show that he was aware that there was something in which they might be implicated, thus showing his knowledge that the property was connected with some offence in which he or others might be implicated. Again his question to second prosecution witness, whether the latter had never had thefts reported to him from Salt Cotaurs from where these articles came, would at once suggest an inference that he knew that the property came from a place where stolen property was likely to be sold. In this view, I have no doubt that the statements as a whole do amount to a confession.

28. A further question arises whether they are admissible in evidence. The statements were made to Captain Phillips in the cutting room of the accused's shop. The Deputy Commissioner of Police was present at a distance of 14 yards and second prosecution witness says that he could not have been overheard when he was talking to the accused. They certainly cannot be deemed to be statements made to the Police and Section 25 is, therefore, inapplicable.

29. The next question is whether they were made by the accused whilst he was in the custody of the Police. No doubt a person is very often in the custody of the

Police before he is actually and formally arrested. It is not disputed that at the time the statements were made the accused had not been formally arrested. Shortly after his carriage was stopped at the Police station, the accused went to the place and explained what he was going to do with the shirts. From there he was taken in the Deputy Commissioner's motor car to his shop where a search was conducted. It is suggested that the accused was then taken in custody because the Deputy Commissioner told him to go in the motor car. This, I think, may well be explained by the fact that the Deputy Commissioner was going to search his shop and naturally wished the accused to be present and, therefore, took him along in his motor car. A Police constable was posted at the door of the shop, but that was necessary in order to prevent people from a busy thoroughfare like the Mount Road pressing into the shop and cannot be said to imply that the accused was not to be allowed to leave the place. The accused does not appear to have been put under any restraint while the search was proceeding and it is, therefore, difficult to say that he was actually in the custody of the Police at that time. When a house is searched, it is the general practice, if possible, to secure the presence of the owner at the search, and Smith's presence in the shop is accounted for by that practice. None of the witnesses have been asked whether Smith's liberty was in any way interfered with, and there is not a particle of evidence on record to show that his movements were restrained and no doubt if the accused had given a satisfactory explanation of the presence of the property in his shop, no further action would have been taken by the Police and Smith would have remained at liberty, after their departure. Can it be said that Smith was actually in custody before the Police knew whether or not he could give a satisfactory explanation of his possession of the property? To hold that he was in custody would on the evidence before us be to hold that any person whose house is searched for stolen property on suspicion is in custody as soon as the search begins. It was only after the search was over and the accused had not given a satisfactory explanation that he was arrested. In these circumstances I can find nothing to show that the accused was in the custody of the Police at the time he made the statements.

30. The defence then rely on Section 24 and say that the statement was one made under an inducement from a person in authority, and it is said that Captain Phillips was a person in authority with reference to this prosecution. Apart from his

position in the Army Clothing Factory, of which he is admittedly not the head, the only evidence relied on is his statement, 'I have been mainly responsible for assisting the Police in the prosecution of this case. I have gone through books and records with prosecution witness No. 1, and the statement of prosecution witness No. 13 the Police Inspector, prosecution witness No. 2 was helping me to investigate.' When the statement was made, the whole affair was in the hands of the Deputy Commissioner of Police, a responsible Police Officer who cannot be said to be in any way subject to the influence of prosecution witness No. 2, and prosecution witness No. 2 had up to that time nothing to do with the case and knew nothing about it. Can it then be said that as an official of the Army Clothing Factory from which the goods are said to have been stolen, prosecution witness No. 2 was a person in authority? He was not the head of that factory: nor does it appear that he had anything to do with its general management beyond his own tailoring department, and consequently, it is difficult to understand how he could have interfered in the prosecution of this case in any way. The Police had started the investigation without his knowledge and without his authority and he was merely called in the course of the investigation to assist the Police. In these circumstances, I can see no reason to hold that he was a person in authority within the meaning of Section 24. Even apart from that, I do not think that he held out any inducement to the accused sufficient to give grounds which would appear to him reasonable for supposing that he would gain any advantage or avoid any evil of a temporal character in reference to the proceedings against him. What prosecution witness No. 2 said to accused was, 'Smith, make a clean breast of it. I want to get hold of the men in the factory.' No doubt he says that he adopted a friendly tone which implied that he was after the men in the Army Clothing Factory and not after the accused. He also says that he intended to convey to Smith the impression that, by his adopting this friendly attitude, it would be for his own good to make a disclosure. We must, however, look to the words of inducement uttered by prosecution witness No. 2 and in the words themselves, there is no inducement whatever. There is no doubt a suggestion that prosecution witness No. 2 was not anxious to prosecute the accused, but only to get hold of his own employees, but prosecution witness No. 2, as that he had no intention of leading the accused to believe that he would get off free. In these circumstances, can it be said that there

was such an inducement as would give the accused grounds for believing that he would secure any advantage or avoid any evil of a temporal nature? Prosecution witness No. 2 made no suggestion that the accused would be any better off if he made the confession, and certainly did not suggest any definite improvement in the accused's position if he did so, so that even if Captain Phillips be deemed to be a person in authority, I do not think it can be said that he gave any inducement and even if some vague promise might be implied from the tone in which the words were spoken, it is difficult to believe that the inducement was such as to cause the accused to believe that it would be for his own temporal good to make a confession. In these circumstances, I would agree, although for different reasons, with the Presidency Magistrate that the statement is admissible in evidence: and if the statement is admissible, and if, as I hold, it is proved that the property was stolen property, there can be very little doubt of accused's guilty knowledge.

31. If we exclude this statement as inadmissible, I think there is sufficient evidence to bring home guilty knowledge to accused that the goods were stolen property; and this knowledge must be inferred from the circumstances of the case. We see that the accused put the goods Material Object No. 1 into his carriage, which then drove off along the road. He may or may not have seen the carriage stopped, but at any rate we find him going of his own accord to the Police station about 20 minutes or half an hour after the carriage had been stopped. He had not been sent for and it does not appear how he knew that the carriage had been stopped. If he saw it stopped, and taken to the Police station, it is difficult to understand why he did not at once go up and ask why there had been this unwarranted interference with his property. There was a delay of 20 minutes or half an hour. When the shop was searched, some of this property, namely, Material Object Nos. 6 and 9 and some other property, was found in a well in the accused's shop. No doubt this well is accessible to anybody in the shop and it is suggested that the tailors working there might have put the property down the well. We have evidence, however, that the property had only very recently been put into the well because the water had not soaked through the canvas. Material Object No. 6 consists of 20 large rolls of canvas and once we concede that Smith was the sole owner and proprietor of the shop, it is difficult to believe that these rolls could have been introduced into that well or even into his shop without his knowledge. When the property was pulled

out of the well, it does not appear from the evidence that the accused said anything except the alleged confession. But in his statement at the trial, he said 'the property found in the well, I do not claim nor did I ever have them.' In the interval between the time when the carriage was stopped and the accused's appearance at the Police station, there was plenty of time for accused to put the property down the well; and I think that, if accused said nothing when this property was pulled out, it is not an unnatural inference to draw that he had nothing to say. If it was a surprise to him that the property should have been found in that place, I think that the reasonable inference to be drawn from the ordinary course of conduct would be that he would have expressed that surprise, and it is difficult to believe that an innocent person who saw this property being produced from his well for the first time would not have at once disclaimed all knowledge. Under Section 106 of the Evidence Act when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him and I think that if this had been a Civil case and the accused had at the trial tried to prove that the property was put in the well without his knowledge, no Court could have disregarded the inference to be drawn from his omission to put forward that theory when the property was first discovered. We have also the fact that the property recovered from Smith's possession is of varied nature and large in bulk. It is difficult to believe that he could have been in possession of this property innocently and not knowing how it had been come by. No doubt some of the bulky articles were found down the well: but I think that these articles also must be deemed to be in Smith's possession. The cases relied on by the defence go to show that the prosecution must prove that the place where the property was found was in the exclusive possession of the accused and this, I think, has been made out in this case. Had the articles been of small nature which a person could have surreptitiously introduced into the well, the inference against the accused would have been considerably weaker and very likely would not have been sufficient to infer his exclusive possession. Considering the nature of the articles, I have no doubt that they could not have got into the well without accused's knowledge or permission. That being so it is for him to explain his possession. He has not done so and the only inference that we can draw is that he knew the nature of the property which had been found. Another suggestion has been made that the

property was not found soon after the theft. The question of the length of time that elapsed between the theft and the discovery of the property no doubt has a bearing on the presumption that should be drawn. But each case must be determined on its merits. In this case, it is possible that the property was stolen even three or four months before it was discovered and even taking it to be that period, I do not think that the interval is so long that in the circumstances proved, a presumption under Section 114 of the Evidence Act should not be drawn.

32. In this view, I think that the accused's guilt has been satisfactorily established and I would dismiss the appeal and confirm the conviction and sentence.

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