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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

(3)

LR 496

M 463/87

BETWEEN JOSEPH

Appellant

A N D POLICE

Respondent

Hearing: 7 October 1987

Counsel: G D Lamplough for appellant
G J Burston for Crown

Judgment: 12 October 1987

RESERVED JUDGMENT OF GREIG J

This is an appeal against the conviction of the appellant on a charge of receiving, after a defended hearing. Two points are made in the appeal, first, that there was not sufficient proof of the date of the alleged theft to permit the application of the doctrine, so-called, of recent possession. The second point was that there was not sufficient material upon which the Judge could have found that the explanation given by the accused was disproved or was otherwise unbelievable.

The appeal arose out of the theft of a Persian rug, described as an Afshar rug, of a value of approximately $3,000. The owner, a company that operates a furniture and furnishings shop in Wellington, made a complaint about the alleged theft on 30 August 1986. On 8 September 1986 the rug was seized by the police from a house in which the evidence indicated it had been for some two weeks. The appellant, when questioned by the police on 7 October 1986, admitted that the rug had been in her possession. It was her explanation to the police, repeated in her written statement which was produced in evidence, that she had received the rug at the beginning of August from a friend who was about to depart for overseas. The appellant had been invited to look after the rug in the absence of her friend. She denied in her statement that she knew

anything about where the rug had come from, how her friend had got hold of it and, in particular, denied that she knew that it was stolen. In her statements to the police she was firm in her claim that she had received the rug in early August.

For the purposes of the appeal the appellant conceded that the evidence at the trial was:

> "(a) The rug belonged to the complainant and was stolen or obtained by a crime, and
>
> (b) the appellant took the rug into her possession."

There seems to be no clear evidence as to the date upon which the rug was stolen. That is certainly to be inferred from the decision of the learned District Court Judge who said expressly that the complainant did not precisely identify the date on which the rug went missing from the shop. The Judge concluded that the rug was stolen by someone at some time before 28 August 1986 and "probably during the month of August".

The record of the evidence is in a common form, as to the evidence-in-chief, in which the recorder has recorded in narrative form the sense of the answers to the questions without recording verbatim the questions and the answers. In this form there is at an early stage of the evidence-in-chief of the representative of the complainant, the first witness called by the prosecution, this sentence:

> "There was an Afshar rug in our premises on 28 August last year."

I was informed by Mr Lamplough that he objected to what was a leading question which was the basis of that sentence. I conclude from that that the learned District Court Judge then put aside in his further and later consideration that evidence but dealt with the later evidence which was to the effect that

the rug had been recently purchased, was new stock, had been on its first display when it disappeared and that, following the absence of the rug being drawn to attention by one of the shop assistants, the witness then went personally to the police on 30 August 1986 to report the matter.

The so-called doctrine of recent possession is a rule of evidence which is, I think, correctly summarized in Adams on Criminal Law and Practice in New Zealand (2nd ed) para 1763, in a quotation from the article of Sir Francis Adams [1967] NZLJ, where he says:

> "...the possession of property recently stolen is, in the absence of an explanation that might be true and would negative guilt, sufficient evidence to justify a finding that the possessor is either the thief or a dishonest receiver; and, if he be the thief, it is also evidence of the commission of any other offence, such as burglary, sufficiently associated with the theft. "

In this case the date of possession by the appellant, either by her own admission or on the evidence given by others, is clear enough. What is not clear is the date of the theft. The argument on behalf of the appellant is that, without a precise date of theft to provide a terminus a quo, the doctrine cannot apply because there is no way to decide what period has elapsed between the theft and the possession. It is to be noted that Mr Lamplough conceded, in my view correctly, that in the case of a rug such as this a period of two months would be a sufficient period to qualify as recent possession.

It will be necessary, and it is certainly usual in most cases, to provide some precise date as to the date of theft, but that is not always essential as the evidence may be sufficient in itself to provide the appropriate inferences. There are cases where, without proof of actual theft and in circumstances where the owner of the goods is not found and is

not known, there may be still sufficient to show receiving. And so, where there is evidence of theft, there may be sufficient without any precise date to satisfy the requirements of recent possession. In this case it is, in my opinion, inevitable that, on a proper reading of the whole of the evidence, this was a recent theft, certainly one that had occurred within two months of the date upon which the appellant was in possession of the item. The evidence of the complainant is plain enough that the rug was a recent acquisition and one which the witness had a considerable familiarity with, sufficient to allow her to identify it with some precision. The only conclusion must be that she would have been aware of its absence soon after it occurred and that that was shortly before the complaint was made. I conclude that there was sufficient evidence to justify the application of the doctrine of recent possession.

The explanation made by the complainant was made to Detective Constable Bouvet at an interview with the appellant on 7 October 1986. She made the explanation once orally and then repeated it in a written statement which she signed. That is an explanation which provides an innocent reason for her possession of the rug and is, on its face, plausible. The learned District Court Judge rejected it and, on the basis that there was no satisfactory explanation, concluded from her recent possession that she was the receiver. The learned District Court Judge described three reasons for his rejection of the statement.

The police called as part of the prosecution evidence Clyde Robert Brown who had lived in the same flat as the appellant in August 1986. He received the rug from the appellant, put it in his parents' home in Wellington, and it was there that the police recovered it on 8 September. Mr Brown's evidence was that he had received the rug from the appellant to look after it for her. He said, as recorded in the notes of evidence:

> "She was going to go down south and I was looking after a few bits and pieces for her and the rug was one of them. I think she was nervous about leaving it at the flat in case it went missing. She said she didn't like to leave them around...I did not know myself where the rug had come from. She said she got it off a friend ...When I got the rug I put it on the floor [in his parents' house]. It was not used really. It was only down there for a couple of weeks."

It will be seen from the foregoing that Mr Brown confirmed the explanation, at least in a general sense, given by the appellant but the evidence that he gives did not in all particulars coincide with the statement and the explanation that the appellant gave.

The learned District Court Judge noted that in answer to a question in cross-examination to Mr Brown - as the Judge recorded it - that Mr Brown "was not aware of any other items belonging to the defendant's friend coming to their flat and I would expect him to have been aware had such been the case when the defendant says that such items as a coffee table, pot plants, and a double bed belonging to her friend were taken to the flat which she and Mr Brown were occupying". What Mr Brown actually said in cross-examination was that he did not remember those items being brought to the flat and his reason, as expressed by him, was that he "probably wasn't there at the time". But, having said that, it is perhaps surprising that Mr Brown did not remember those additional items being added to the furniture in the flat of which he was an occupant. However, the rather incomplete answer must be of slight weight to discredit the explanation made by the appellant. It is not as if he was directly or even indirectly denying that the appellant's friend had brought the rug and these other items to the flat and Mr Brown's evidence is that the rug was given to him for safekeeping and not to be left at the flat.

The learned District Court Judge took note of the fact, as he described it, as "a remarkable circumstance" that only this one item, the rug, was taken by Mr Brown for safekeeping out of the flat. It is not quite clear what was taken from the flat or kept in the flat under the safekeeping of Mr Brown. In her statement the appellant said that Mr Brown had taken the rug, some leather trousers, some vases and other things to look after. Mr Brown in his evidence said that he was looking after a "few bits and pieces" for the appellant and the rug was one of them. It does not seem to me to be an unusual or surprising circumstance that by far the most valuable item, a Persian rug, was taken somewhere else rather than left in a flat occupied by a number of people. At all events that cannot, in my view, discredit the explanation which is given in this case.

Another matter which was noted by the learned District Court Judge was that Mr Brown in his evidence made reference to his understanding, at the time, that the appellant was "going south" but in the statement and in the other parts of the evidence there was nothing to show or to confirm that she had in fact gone south. There may be some speculation as to why the appellant was not interviewed until 7 October 1986, a month after the rug was recovered from Mr Brown's parents' house. The period in between might have given time to go south and return but it is true that there is no evidence about that except that it seemed implicit from evidence given at the hearing that the appellant was then living in the South Island. However that does not seem to raise any discrepancy in the statements made. The appellant in her statements did not mention her departure at all, or intended departure.

Finally, the learned District Court Judge noted that the appellant had elected not to give evidence. He said this, on this topic:

> "I note that she has not elected to give evidence on these matters today in order to clear up these doubts,

and in the circumstances I do not regard the explanation given by the defendant to the Police as sustainable."

It is not, of course, for the appellant as an accused person to give evidence. There are cases where the accused's silence may be taken into account because the accused has failed to give an explanation which might naturally be expected. That, however, only arises where a prima facie case has been established: see Trompert v Police [1985] 1 NZLR 357. Different considerations apply in a case such as this where a plausible explanation has been given after which it is for the prosecution to establish beyond reasonable doubt that, notwithstanding that explanation, the accused is guilty of the charge. This was not a case, therefore, where the absence of explanation by the accused could be put in the balance in support of the Crown's case.

In my view the learned District Court Judge erred in concluding on any or all of the matters which he referred to in his decision that the explanation was unsustainable or otherwise disproved internally or externally. At the end of the day the explanation remained as a plausible, as a reasonable probability which ought to have left a reasonable doubt. In the result the appellant, notwithstanding the fact that there must be grave suspicion, ought to have been acquitted. The appeal must be and is therefore allowed and the conviction is quashed.

Hansen J

Solicitors for the appellant: Chapman Tripp Sheffield Young (Wellington)

Solicitors for the respondent: Crown Solicitor (Wellington)