

IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 10 of 1978

1. SHANTILAL s/o Damodar
2. HASMUKH LAL s/o Damodar
3. VASANT LAL s/o Amba Ram
4. CHANDRA KANT s/o Shivrul Appellants

v.

REGINAM

Respondent

S.M. Koya for the 1st, 2nd, 4th Appellants  
R.I. Kapadia for the 3rd Appellant  
R. Lindsay and D. Fatiaki for the Respondent

Dates of Hearing: 19th, 20th, 21st, 24th,  
25th, 26th, 27th, 28th July,  
1978.

Delivery of Judgment: 4th August, 1978.

JUDGMENT OF THE COURT

The trial in the Supreme Court which resulted in each of the four appellants being convicted of the offence of receiving stolen property was very protracted; it opened on the 3rd October, 1977, was adjourned to the 24th October, 1977, and ended, after a number of interruptions on the 24th February, 1978, when each appellant was convicted and sentenced. There were originally seven counts. The first appellant was charged on Counts 1 and 2, was convicted on both and sentenced to concurrent terms of six years' imprisonment. The second appellant, charged only on Count 3, was convicted and sentenced to six years' imprisonment. The third appellant was charged on Counts 4 and 5, but was acquitted on

Count 5, convicted on Count 4, and sentenced thereon to six years' imprisonment. The fourth appellant was charged on Counts 6 and 7, but at the close of the prosecution case it was ruled by the learned judge that he had no case to answer on Count 6 and he was acquitted on that count; on Count 7 he was convicted and sentenced to six years' imprisonment. On the counts left to the three assessors their opinion (which was accepted by the learned judge) was unanimous, for convictions on Counts 1, 2, 3, 4 and 7, and for acquittal on Count 5.

An unusual feature of the charges, as framed, was the extreme generality of the allegations as to time and goods, and as this has been made a ground of appeal we give a summary of the counts.

Accused	<u>Dates of Receipt</u> <u>Alleged</u>	<u>Alleged Value</u> <u>And Ownership</u>
Count 1 Shanti Lal	Between 1/4/74 & 5/4/77	Morris Hedstr Limited \$3,515.33
Count 2 Shanti Lal	Between 1/10/74 & 5/4/77	Burns Philp (SS) Co. Ltd \$3,419.33
Count 3 Hasmukh Lal	Between 1/4/76 & 5/4/77	Morris Hedstr Limited \$287.27
Count 4 Vasant Lal	Between 1/3/73 & 5/4/77	Morris Hedstr Limited \$6,278.46
<u>Count 5</u> Vasant Lal	Between 1/1/76 & 5/4/77	Burns Philp (SS) Co. Ltd \$97.96
<u>Count 6</u> Chandra Kant	Between 1/1/74 & 5/4/77	Morris Hedstr Limited \$3,802.60
Count 7 Chandra Kant	Between 1/10/74 & 5/4/77	Burns Philp (SS) Co. Ltd (a) \$3,419.33 (b) \$208.50

The counts underlined resulted in acquittals. The property alleged in each case was described merely as "clothing" except for an additional item in Count 7 - "four fans (Price \$208.52)".

On the 5th April, 1977, in pursuance of search warrants various shop premises in Suva were subjected to search. The first appellant's premises in Dominion Arcade were visited twice. On the first visit nothing was seized but on the second visit, conducted by D/Sen. Inspector C.B. Singh and D/Sgt. Pauliasi, there were seized a large number of items of clothing selected by Catherine Chang and Elizabeth Waqanivavalagi, members of the staff of Morris Hedstrom Limited, as belonging to that company. These items which were placed in five cartons, are the subject of Count 1. At the same time Donald Milne, of the staff of Burns Philp (SS) Company Limited, also selected a number of items of clothing which he claimed were the company's property and which were put into twenty-three cartons, and are the subject of the second count.

On the same morning a search warrant was executed by D/Cpl. Vikram Anand at the shop of the second appellant in Victoria Parade. Again Catherine Chang selected a number of items, claimed to belong to Morris Hedstrom Limited; they were seized and are the subject matter of Count 3. There was by comparison a small quantity involved and they were placed in one carton.

On the afternoon of the same day D/Cpl. Vikram Anand led another search at the shop of the third Appellant at Waimanu Road, where again Catherine Chang

and Elizabeth Waqanivavalagi picked out a large number of items of clothing which they claimed to belong to Morris Hedstrom Limited. These became the contents of twenty cartons and were the subject matter of Count 4.

Also seized at the search last mentioned was a comparatively small quantity of clothing identified by Donald Milne as the property of Burns Philp (S.S.) Company Limited. These were made the subject of Count 5 upon which the third appellant was acquitted.

On the same day, 5th April, 1977, the shop of the fourth appellant at Pier Street was searched but no goods were claimed to belong to either Morris Hedstrom Limited or Burns Philp Limited. The fourth appellant was however charged on Count 6 with receiving goods belonging to Morris Hedstrom Limited valued at \$3,802.60, which, it will be seen is the same as the total value of Morris Hedstrom Limited's goods in Count 1 (first appellant) and Count 3 (second appellant): and on the 7th count the fourth appellant was charged (in addition to the four fans) with receiving Burns Philp (S.S.) Company Limited's goods valued at \$3,419.33 which is the same figure as in Count 2 against the first appellant. No fans were found at the shop of fourth appellant at Pier Street: two were found in the Victoria Parade shop. As has been mentioned the learned judge ruled that the fourth appellant had no case to answer on the sixth count.

The first and second appellants are brothers and the fourth appellant is a cousin of theirs: they all reside together at 65 Gordon Street, Suva. The third appellant is not related. At the trial in the

Supreme Court and on the appeal Mr. Koya represented the first, second and fourth appellants. In the Supreme Court counsel for the third appellant was Mr. Sherani, but on the appeal he was represented by Mr. Kapadia.

There are some matters argued on the appeal which we will deal with first. Mr. Koya, after the pleas were taken, asked for severance of the trial in relation to the first, second and fourth appellants. He said there was no question of the charge being one of joint receivers and some evidence would be inadmissible against each. Mr. Sherani did not join in this application at that time, merely commenting that he wanted the trial to commence as soon as possible. We were informed that the same counsel had represented the appellants throughout the committal proceedings.

The broad facts touching this matter were that the three shops in which the first, second and fourth appellants were carrying on business were owned by a partnership called Bhulabhai & Sons, in which the first and fourth appellants were partners and the second appellant was an employee - the three lived together. Property allegedly stolen from either Morris Hedstrom Limited or Burns Philp Limited was found in the Dominion Arcade shop, operated by the first appellant and the Victoria Parade shop, operated by the second appellant. There was evidence that stolen electric fans were delivered to the fourth appellant and that two of them were found at the Victoria Parade shop; also that stolen clothing was received at the Pier Street shop, operated by the fourth appellant and sent to the other two shops of Bhulabhai & Sons.



In Narend Prasad and Lum Sik (Cr. Apps. 14&16 of 1971) this court dealt with the authorities on the subject of separate trials and we do not need to repeat them. It is enough to say that when such a matter is raised in a court of criminal appeal the question is whether the exercise of the trial judge's discretion resulted in a miscarriage of justice. Here the learned judge said -

" I have given careful consideration to the application made by Mr. Koya for a separate trial of 1st, 2nd and 4th accused. I have come to the clear view that having regard to the nature of the Crown allegations and the relationship of the accused to each other and common sources of the alleged stolen property, it appears to me that the necessity of the situation in this particular case is that there should be a joint trial of the 4 accused. I am satisfied that not only will this save costs but on balance it will be in the best interests of justice. Accordingly I exercise my discretion in refusing Mr. Koya's application."

In our opinion on the application before him the learned judge's ruling was a correct exercise of his discretion and the situation did not change during the trial.

Had a firm application been made at that stage on behalf of the third appellant his case would have been stronger as the only evidence connecting him with the other appellants was the finding of clothing of the same nature, in substantial quantities and from the same sources, in his shop in Waimanu Road. It would seem that the learned judge did consider that that factor justified a joint trial. However, at that time Mr. Sherani made no application, though on the 10th November, 1977 he joined in another application by Mr. Koya based on objection to evidence of certain conversations. Counsel on the appeal did not draw our attention to this episode and it apparently has little significance.

Then on the 14th December, 1977, Mr. Sherani, apparently on the ground that evidence was about to be led from persons (referred to generally in the trial as "the thieves") who would implicate the other appellants, asked the court to "withdraw" the case against the third appellant. Presumably this was taken as a request for a ruling that the third appellant had no case to answer as the court said the application was premature. At the end of the prosecution case Mr. Sherani submitted that there was no case to answer. When this was refused he applied for a separate trial on the ground that the evidence of the thieves would prejudice his client in a way that the summing up would not cure. At this stage of course, a separate trial would have necessitated a new trial before different assessors. The learned judge did not agree, as he refused the application; he directed the assessors that there was no direct evidence from any thief implicating the third accused. The fact that the assessors gave the opinion that he was not guilty on one of the two counts against him shows that they were appreciating the evidence. The late stage at which this application was made, though it is a factor to be considered, would not prevent an appeal on this ground from succeeding in a proper case, but we are not of opinion that any miscarriage of justice here ensued. Such grounds of appeal as touch on the matter of separate trials therefore fail.

Another ground argued was that the seizure of the goods from the various shops was illegal, by reason of defects in the procedure whereby the search warrants were issued. The learned judge having heard argument dealt with the matter in a detailed ruling and came to the conclusion that the searches were lawfully carried out as the warrants in question were validly issued. He added that should he be wrong in his conclusion, he would nevertheless exercise his discretion and admit the evidence as to the seizures. Agreeing, as we do, that

the learned judge had such a discretion, we also agree that it was undoubtedly a case in which he would have been right to exercise it in the way he indicated. There was no suggestion of mala fides on the part of anyone concerned in the issue of the warrants. In the circumstances it would have been idle for us to consider counsels' arguments on the validity of the warrants and we did not call on counsel for the Crown to reply. These grounds also fail.

We come next to attacks made upon the admissibility and weight of the evidence of heads of departments who gave evidence identifying the goods found at the Dominion Arcade, Victoria Parade and Waimanu Road shops as goods of Morris Hedstrom Limited or Burns Philp (S.S.) Company Limited, as the case may be. From this point we will adopt the descriptive phrases "Morris Hedstrom" and "Burns Philp" in relation to these two companies. On this topic there are passages from the summing up which are relevant:

" In assessing the quality of identification of goods in this case you may take into account the fact that all the main identifying witnesses namely Catherine Chang, Elizabeth Waqanivavalagi, Gopal Reddy of Morris Hedstrom Limited and Donald Milne of Burns Philp Limited, not only occupy senior positions in their respective departments but were themselves personally and intimately familiar and experienced with the type of merchandise about which they have given evidence in Court."

Having referred to Catherine Chang and Gopal Reddy as the identifying witnesses in relation to Morris Hedstrom on Count 1 he said:



"In this connection you will no doubt bear in mind some of the distinguishing features about the clothing which they have described and to which I have already referred. You will also no doubt bear in mind the particular experience, familiarity and special knowledge of Catherine Chang and Gopal Reddy with regard to the type of garments about which they have given evidence. Apart from the cost-code markings of Morris Hedstrom Limited on which Catherine Chang gave evidence, she has also given evidence that many of the brand labels on the garments have been removed or cut off. This evidence is also important because, if accepted, it tends to support the prosecution contention that this was a clear attempt to conceal the fact that the clothing concerned was in fact stolen."

In relation to Burns Philp clothing and the second count the identifying witness was Donald Milne; the learned judge said -

"It is a matter for you to decide whether his identification of clothing is satisfactory as proving beyond doubt that the clothing which forms the subject-matter of the charge in the second count in fact belongs to Burns Philp Limited. In this connection you will no doubt bear in mind some of the distinguishing features about the clothing which he has described and to which I have already referred. You will also no doubt bear in mind the particular experience, familiarity and special knowledge of Donald Milne with regard to the type of garments about which he has given evidence."

A passage to which exception was taken by Mr. Koya is:

"The identification of clothing is a matter for the experts, such as you may think, Catherine Chang and Gopal Reddy in regard to the clothing in the first count."

This is followed a little later by:

"An expert identifying witness concerning clothes suspected to be stolen does not have to go to Hong Kong or Australia and visit the clothing factories there to qualify her to give evidence in regard to clothing allegedly made in Hong Kong or Australia. Any person who is and has been familiar and closely associated with that type of products concerned can give evidence about them from his own personal

knowledge. The reliability of such a witness will of course depend in direct proportion to the amount of experience and familiarity she or he has with regard to the products concerned."

There were similar passages later in the summing up.

In our opinion the learned judge did not put those witnesses forward entirely as experts in the strictly technical sense. They were dealing with objects with which they were familiar. If they had reference to cost code marks, labels etc. it was not to prove that the goods were a particular price but because the cost code was part of their system and a means of identification. Catherine Chang, at whom most of the criticism was directed, was a buyer of ladies fashionwear for Morris Hedstrom; first as assistant buyer from early 1975 and then as official buyer in 1976. As buyer one of her main functions was to receive the goods into the store and put prices on them. She claimed personal knowledge of prices and order dates. An illustration can be taken at random from Ex. 68 - 13 ladies slacks - she gave evidence that she received them into stock, marked them, put in their retail prices and cost-coding with dates received. Her marks D/XR were still there. She made buying trips and identified articles she bought on such a trip to New Zealand and others on a trip to Australia. Another example is 10 pairs of ladies' panties purchased by her personally from the Bendon factory in New Zealand in 1976. She said Morris Hedstrom were sole distributors for Bendon and she received them herself. She admitted on occasions that she relied on invoices for dates of receipt and was shown to have made at least one error as to the shop from which Ex.92/6, 6A, 6B came from. That was a factual error, among hundreds of exhibits, and not an error in identification.

Gopal Reddy, another identifying witness, had worked for Morris Hedstrom for twenty-one years. He was head of the drapery department. He identified shirts of particular brands which he had ordered himself, at

Dominion House. Also at Waimanu Road tablecloths from New Zealand made to his order with a special design which he had sent the makers: also trousers bearing a style number he ordered. Some of the trousers were of a brand sold only in Fiji by Morris Hedstrom.

Elizabeth Waqanivavalagi, also of Morris Hedstrom worked for them for ten years - for three years in the baby department of which she was head. She received stock as head of the department.

Donald Milne was employed by Burns Philp as Products Controller - in fact a buyer of soft goods. Burns Philp also used a cost code. Among the things he identified were raincoats still bearing the Burns Philp cost code, Uvex sunglasses of which Burns Philp had exclusive distribution rights in Fiji, souvenir place mats with exclusive designs of which they had photographs, souvenir tablecloths in the same position. The witness in cross-examination gave the following summary of his approach -

" Some of the merchandise I am certain of. I handle so much of the stuff. Apart from my reliance on B.P. cost-code markings on the articles I am able also to identify the articles from my personal knowledge of the fabric, texture and design of the materials gained from my own experience in those lines.

I also recognise the writings on the cost-code and in many cases they are in the handwriting of the Fijian employee at the warehouse. Standard operation is to have cost-code. M.H.'s is very similar to ours.

I have done a lot of writing of cost-codes in my two years.

Also some of the goods are identical in every way in the fabric and design with similar merchandise we keep at the reserve stock at Walu Bay."

The reference to the cost code there, does not import any breach of the hearsay rule. The evidence of the code attached to the garment and that it is the code used by the company is what is important. The truth of its contents is not in question. The rest of what the witness said is based on his own knowledge and experience.

We think that the evidence of all these witnesses was admissible and fit to be left to the assessors on the question of identification: if there was any breach of the hearsay rule it was minor and the great bulk of the evidence came from their own knowledge. We also consider that the lists made and used by these witnesses in giving their evidence were made at such times as to render their use permissible. There is the related point that the evidence of Catherine Chang, Gopal Reddy, Elizabeth Waqanivavalagi and Donald Milne gave evidence of goods shortfalls in their departments. The latter in particular said he had participated in these stocktakings in his department in June and October 1976 and April 1977. The total shortfall was approximately \$24,000. Catherine Chang did not personally take part in stocktaking but was head of the department and we consider that, as such, she was in a position to say, as she did in cross-examination, that there was a shortfall of some \$6,000 in January, 1977, in her department. Gopal Reddy spoke from personal knowledge of a shortage in trousers of the kind he was identifying. We do not consider the objection taken to evidence of this nature is a valid one.

It is now appropriate to summarize the evidence in the case of each accused and in doing so we put aside for the time being the factor that some of the goods seized in the various shops were identified only as being of the same description as merchandise sold by them. The learned judge very painstakingly made two lists for the benefit of the assessors, one of goods



which had certain distinguishing features aiding in their identification and one where the similarity was merely general. We will return to this question when we deal with criticisms of the summing up. We also put aside for the moment the implications arising from the allegation that some of the witnesses were in the position of accomplices.

We have already mentioned that the first appellant was at the material time a partner in Bhulabhai & Sons the owners of the shops at Domain Arcade (where he was in charge) and at Victoria Parade and Pier Street. Dominion Arcade had only been opened about the beginning of 1977 when it replaced a shop at Renwick Road where the business had previously been carried on. As to the first count there was first the seizure of a very large number of articles found in the shop on the 5th April, 1977, and identified as belonging to Morris Hedstrom by Catherine Chang and Gopal Reddy. They filled five cartons and in many cases brand labels had been removed. Then there was the evidence of Vilimone Vonotabua that he had stolen goods of the kind in question from Morris Hedstrom over a substantial period in 1976 and 1977. He started doing so at the suggestion of the first appellant and delivered the goods to him first at the Renwick Road shop and then at Dominion Arcade, receiving payment on each occasion. During the search the appellant was asked by D/Sen. Insp. C.B. Singh for invoices or receipts and said he had none.

As to the second count, items which filled twenty-three cartons were identified as belonging to Burns Philp by Donald Milne who also testified to the shortages we have mentioned above. Five witnesses, former employees of Burns Philp, gave evidence that they had committed numerous thefts from that company. They had all been convicted on their pleas of guilty



and sentenced. They were Josefa Delana, Paulo Bete, Waisea Delana, Rudolph Evans and Atunaisa Milo. In all cases the goods were delivered to the first appellant, either at Renwick Road or later, at Dominion Arcade, and payment was made by the first appellant. The dates were from 1976 to 1977 and the goods were of the type found in the shop. Again in relation to those goods Inspector Singh asked if he had any invoices and the reply was that he did not.

There was also the evidence of Semisi Nabola, who also had worked for Burns Philp, that at the request of the first accused he passed on a message to the witnesses last mentioned, that they would be paid \$200 if they did not identify the first appellant.

On the night of the 5th April, 1977 the first appellant made a statement to D/Cpl. Naicker. As to 61 items found in his shop, put to him individually, he answered that Shiv Lal Bhulabhai (i.e. one of the partners) "got it from somewhere". He admitted being in the shop when the goods were brought in by Shiv Lal "sometime last year" but Shiv Lal gave him no invoices or dockets. Shiv Lal, who was an uncle of the first appellant, had left for India on the 21st January, 1977. In evidence he said that Shiv Lal had left Fiji when the business, transferred from Renwick Road, opened in Dominion Arcade, and the first appellant became manager. He said that Shiv Lal kept a file of invoices and produced what he said were some of the items. His statement to the police was wrong in that he now denied being in the shop when Shiv Lal brought goods and his statement that everything was paid for in cash was wrong. Bhulabhai & Sons did not have a cost code.

The second appellant was convicted on Count 3. The amount of clothing concerned is small by comparison with Counts 1 and 2, in which the value is put at \$3,519.33

and \$3,419.33 respectively, whereas that alleged for Count 3 is only \$287.27. As has been seen, the second appellant was not a partner. The clothing concerned was identified as belonging to Morris Hedstrom by Catherine Chang and again the learned judge divided the articles into two lists. The evidence of Vilimone Vonotabua is relevant only to the extent that it shows extensive thefts by him and others from Morris Hedstrom during 1976 and 1977; he did not claim to have any dealing with the second appellant. The evidence of two witnesses, Waisake Buidole and Rudolph Evans was admitted by the learned judge under section 351(a) of the Penal Code for the purpose of proving guilty knowledge, as showing that property stolen within twelve months preceding the date of the offence was found or had been in the second appellant's possession. The admission of this evidence is challenged on the appeal.

Waisake Buidole said that he stole from Burns Philp oil of ulan on more than one occasion and sold it to the second appellant at the Victoria Parade shop. Rudolph Evans stole also from Burns Philp, and in addition to selling clothing to the first appellant from June 1976, to March 1977, he sold some perfumes and clothing to the second appellant at the Victoria Parade shop. No perfumes or clothing alleged to be that of Burns Philp were included in Count 3 against the second appellant.

At the time of the search Inspector Singh asked the second appellant if he could produce any receipts showing where the goods came from. He said "No. I haven't got it". In an interview on the same evening he said that, though he had worked for Bhulabhai shop for about 4 years it was only for the last two months he had been staying in the shop.

Shankar Lal had been the manager but he had gone to Canada and since then the fourth appellant had run the shop. The clothing seized had been in the shop when he took it over and he did not know where it came from. The fourth appellant operated the shop by keeping the keys, giving them to the second appellant in the morning and receiving them back with the money, in the evening. In his charge statement the second appellant said he was just working there on wages as a tailor. In his evidence he said Shankar Lal left Fiji in December, 1976, and he came to the shop in January 1977; up to that time Shankar Lal had bought stock for the shop and he knew the goods seized were there prior to his leaving. He denied having bought goods from either Rudolph Evans or Maisake Buidole and said that similar goods could be purchased in other shops in Suva. Since Shankar Lal left, Rati Lal had done the buying and sometimes produced the keys. He also inspected the premises four or five times per day.

The third appellant was acquitted on Count 5 which was framed in relation to a small quantity of goods (\$97.96) allegedly from Burns Philp. On the other hand Count 4, upon which he was convicted, related to a very large quantity of goods valued at \$6,278.46 said to be the property of Morris Hedstrom. They filled 20 large cartons and were identified by Catherine Chang, Elizabeth Waqanivavalagi and Gopal Reddy. There was in this case no direct evidence from any thief but the learned judge directed the assessors that they could have regard to the evidence of shortages in Morris Hedstrom stocks, and to that of Vilimone Vonotabua concerning thefts of clothing from that shop in 1976 and 1977. Vilimone's evidence lent support to the view that other thieves were operating from Morris Hedstrom at the same time. Apart from these collateral circumstances the prosecution relied on the doctrine of recent possession to which we will advert later.

On the evening of the 5th April, 1977, the third appellant made a statement to D/Cpl. Vikram in which he said he had bought the bulk of the goods in question from a Fijian man with whom he had been dealing since 1976. He did not know his name but called him "brother" or "bro.". Some items he had acquired by exchanging garments with tourists. He repeated this in evidence. After the raid on the shop he found out that this Fijian's name was Mikaele. The Fijian would come to the shop with a Morris Hedstrom order book and he would give an order which the Fijian would enter in the book. The goods would be delivered in a Morris Hedstrom van sometimes driven by the man and sometimes not. In cross-examination the appellant said that he knew that Mikaele was convicted of stealing goods from Morris Hedstrom. He claimed to have bought the goods at full price but could not produce any receipts or invoices. He denied that he knew the goods were stolen when he received them.

We come now to the case against the fourth appellant. He operated the shop at Pier Street. The learned judge ruled, on the sixth count, which was concerned with clothing from Morris Hedstrom, that there was no case to answer as there was no evidence that he had received the clothing alleged. The seventh count was concerned with clothing from Burns Philp valued at \$3,419.33 and with four electric fans said to be worth \$208.52. The shop at Pier Street was searched but nothing was found.

The evidence the prosecution relies upon in relation to the clothing is first that of Jovilio Nabukeke. He said he started stealing from Burns Philp's Walu Bay storeroom from mid-1975, clothing such as men's trousers, ladies' panties and handkerchiefs. He sold all these things to the fourth

appellant at the Pier Street shop and received payment from him: he would have gone to see the fourth appellant on more than ten occasions.

Lia Saqacala was an employee at the Pier Street shop from March 1974 until the 7th January, 1976. She testified that Jovilio (and other Burns Philp employees) used to come to the shop and see the fourth appellant. Jovilio would bring goods wrapped in parcels which would be left in the fitting room; later the goods would be divided and sent to the Bhulabhai shops in Victoria Parade and Renwick Road. That is all the evidence and it is quite clear that this count, so far as it related to the clothing, was never supported by the evidence and the conviction upon it (in relation to the clothing) cannot be allowed to stand. The count relates to clothing valued at \$3,419.33 and the figure indicates that it is alleged to be the same clothing which is included in Count 1 against the first appellant in relation to the Dominion Arcade shop. Mr. Lindsay agrees that this is the prosecution's intention. There is no charge that the first and fourth appellants were jointly in possession of the goods found. The evidence was not marshalled along those lines, nor was there any direction to the assessors along those lines. To convict the fourth appellant the prosecution had to show that he had, at some time, received those goods which were seized at Dominion Arcade. All the prosecution can show is that some parcels of goods stolen from Burns Philp, were received by the fourth appellant and divided, some of the contents



possibly going to the Renwick Road shop, the predecessor of Dominion Arcade. In seeking to establish Count 2 the prosecution relied on the evidence of Paulo Bete, Rudolph Evans, Atunaisa Milo, Waisea Delana and Josefa Delana as showing that they had contributed substantially to the Burns Philp goods in Dominion Arcade and there is no evidence at all that the fourth appellant had any connection with what those witnesses claimed to have sold to the first appellant. All that can be said of the fourth appellant on the evidence is that he received a comparatively small quantity of stolen goods some of which may possibly have found their way to Dominion Arcade. The fourth appellant is entitled to be acquitted on this aspect of Count 7 and in dealing with it from this point we will regard it as confined to the four electric fans.

The evidence as to those is much more cogent. Jovilio Nabukeke said that in 1977 the fourth appellant wanted electric wall fans. He arranged the matter, with the co-operation of Rudolph Evans of the bulk store. Jovilio was the driver, and he signed a delivery docket (Ex.O) and an invoice (Ex.P) for the fans which he took straight to the fourth appellant at Pier Street. On the instructions of the fourth appellant he took the fans to the house of the latter in Gordon Street. He then returned to the shop and was paid \$60 - \$15 for each fan. Exhibit P describes the fans as Hitachi Wall Fan WF 816 - 4 only. Rudolph Evans testified that he had prepared Ex.P which he identified and the date was the 10th February, 1977. The fans were from the

warehouse stocks of Burns Philp, and four fans were packed in one carton. Paula Rayasi, who had spoken to Evans at Jovilio's request, accompanied Jovilio when the fans were delivered, and saw money pass. He himself was paid \$28. Two Hitachi electric fans were found on the 5th April, 1977, at the Victoria Parade shop and were identified by Rudolph Evans and Donald Milne as being of the same type as was sold at Burns Philp. The model number corresponded with that in the invoice Ex. P.

The evidence of the fourth appellant on this item is merely a complete denial that he had ever received any carton containing four Hitachi fans from Jovilio Nabukeke or Paula Rayasi. He had received six electric fans from the latter but not Hitachi fans.

Additional evidence relied on by the prosecution against this appellant is that of Jovilio Nabukeke who said that after his release from gaol to serve his sentence extramurally the first appellant told him that the fourth appellant wished to talk with him. They met at the Victoria Parade shop and the fourth appellant asked him not to point out the fourth appellant in court and he would pay the witness \$100 or \$200.

We now continue with the grounds of appeal.

It was argued by Mr. Koya on behalf of the first, second and fourth appellants and by Mr. Kapadia on behalf of the third appellant that the respective indictments were defective

in that the appellants were charged with receiving clothing and in the case of the fourth appellant 4 fans knowing the same to have been stolen on dates unknown between the specified dates set out in the counts. In other words, it was submitted by counsel that the counts were bad in law in that, they alleged the commission of several offences of receiving stolen property at various dates between the dates stated.

The counts have already been set out in detail in this judgment and we need not repeat them. In view of the conclusion to which we have come in respect of Count 7 against the fourth appellant we need only consider this ground of appeal as it affects Counts 1, 2, 3 and 4 affecting the first, second and third appellants. Count 7 against the fourth appellant is restricted now to the conviction for receiving 4 fans knowing them to have been stolen so no question of duplicity arises in his case.

The Fiji Criminal Procedure Code  
Cap. 14 provides in Section 120:

"120. Every charge or information shall contain and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

The counts against the first, second and third appellants alleged that between certain stated dates they had received clothing to a quantified value knowing that it had been stolen.

The evidence disclosed that the appellants were present, and represented by counsel, at the preliminary inquiry before the Magistrate when the evidence in support of the charges was led by the Crown. The counts laid before the Magistrate were substantially the same as those heard in the Supreme Court except that the dates between which the stolen goods were received, and the quantified cost price thereof were amended prior to the hearing in the Supreme Court. The amendments were duly granted by the trial judge; each appellant pleaded not guilty and informed the Court that he understood the charge brought by the Crown. Upon the arraignment of the appellants defence counsel sought no further particulars from the Crown in respect of the counts.

After the prosecution had called its evidence and tendered the numerous exhibits Mr. Koya for the first and second appellants and Mr. Sherani for the third appellant submitted that the counts against the first, second and third appellants were defective, in that multiple offences were disclosed on the evidence and that the counts as laid by the Crown were bad for duplicity. In other words they argued that in respect of each item of clothing alleged to have been stolen and received by the appellants a separate count should have been laid in respect thereof. The trial judge in his ruling said:-

" As regards the defence submission that the charges as formulated in the respective counts in the Information are defective on various technical grounds, in the particular circumstances of the present case, and in the absence

of any application for further particulars from counsel at the time of arraignment of each of the accused I can find no basis for upholding the submission. The submission is therefore rejected."

As we have observed the appellants had heard the evidence against them in the Magistrates Court when the preliminary inquiry was held; no application for further particulars of the charges were asked for or sought by the appellants before arraignment and they had heard the evidence given in the Supreme Court. What then was the situation at the close of the case for the Crown? Upon the evidence then before the Court, was the trial judge in error in failing to uphold defence submissions that the counts were bad for duplicity?

The Crown had led evidence that the receiving of stolen clothing was on a massive scale. Evidence had been given by the senior buyers and stock controllers at Morris Hedstrom and Burns Philp of the large quantities of merchandise found in the stores of the first and third appellants and to a lesser extent in the store managed by the second appellant.

The first appellant when questioned by the police claimed that he did not have any stolen property in the shop managed by him in Dominion House; he claimed that he had not received any stolen goods at any time; that the clothing seized by the police as belonging to Morris Hedstrom was purchased in the main by Shiv Lal before he left Fiji in January 1977. His defence was a categorical denial of receiving stolen clothing. Likewise the second appellant, when asked by the police to



account for his possession of clothing belonging to Morris Hedstrom maintained that he knew nothing about any stolen clothing being in his possession and denied ever receiving same. His defence was a blanket denial of having received stolen clothing during the period stated in the count. The third appellant, denied being in possession of any stolen clothing; he maintained that he had purchased the clothing seized by the police from a Fijian since 1976 and whose name he did not know; that at no time did he believe that the goods were stolen. His defence, therefore, was again a straight out denial of receiving clothing knowing it to have been stolen.

In these circumstances the appellants cannot be heard to say that they were embarrassed or prejudiced in their defence because the Crown had not laid separate counts in respect of each and every item of clothing alleged to have been stolen giving the date of each separate receipt by the appellants of each item of the stolen articles. It must be remembered that there was no question of the appellants not having being fully informed of the charge and the evidence against them. At no time did any of them seek further particulars, or claim that they did not understand the charge.

The House of Lords in Director of Public Prosecutions v. Merriman (1972) 56 Cr. App. R. 766 held that it is legitimate to charge as a single information an activity even though that activity may involve more than once act. Lord Morris of Borth-y-Gest at p.776 said:-

" It is furthermore a general rule that not more than one offence is to be charged in a count in an indictment. By rule 4 of Schedule 1 to the Indictment Act 1915 it is provided as follows: "A description of the offence charged in an indictment, of each offence so charged, shall be set out in the indictment in a separate paragraph called a count." The question arises - what is an offence? If A attacks B and, in doing so, stabs B five times with a knife, has A committed one offence or five? If A in the dwelling house of B steals ten different chattels, some perhaps from one room and some from others, has he committed one offence or several? In many different situations comparable questions could be asked. In my view, such questions when they arise are best answered by applying common sense and by deciding what is fair in the circumstances. No precise formula can usefully be laid down, but I consider that clear and helpful guidance was given by Lord Widgery C.J. in a case where it was being considered whether an information was bad for duplicity (see *Jemmison v. Priddle* (1971) 56 Cr. App.R. 229 at p.234; (1972) 2 W.L.R. 293 at p.298). I agree respectfully with Lord Widgery that it will often be legitimate to bring a single charge in respect of what might be called one activity even though that activity may involve more than one act. It must, of course, depend upon the circumstances."

Lord Diplock in *Merriman's case* (supra) stated:-

" The rule against duplicity, viz., that only one offence should be charged in any count of an indictment, which is now incorporated in rule 4(1) of the First Schedule to the Indictments Act 1915, has always been applied in a practical, rather than in a strictly analytical, way for the purpose of determining what constituted one offence. Where a number of acts of a similar nature committed by one or more defendants were connected with one another, in the time and place of their

commission or by their common purpose, in such a way that they could fairly be regarded as forming part of the same transaction or criminal enterprise, it was the practice, as early as the eighteenth century to charge them in a single count of an indictment."

We take the view that the older authorities which expressed a contrary view to that stated above were influenced by a degree of technicality which in our opinion, has no relevance to modern procedure in criminal prosecution.

In the instant case on appeal the police had found in the possession of the appellants several thousand items of clothing which, on the evidence must of necessity have involved numerous acts of receiving on the part of the appellants, from several persons, at various times between the dates stated. The Crown does not know when each of the several thousand items of clothing was received by the appellants. Surely it would offend common sense to require the Crown to lay a separate count in respect of each item even if the necessary information was available.

In any event, ought not the receiving of clothing by each appellant to be regarded as one activity? Applying the principle stated by the House of Lords in Merriman (supra) common sense and logic would in our view dictate on the facts of this case that the laying of single counts against each appellant in the manner in which the Crown had drawn the counts was the only practical way of dealing with the matter. If common sense is the criterion it would be ludicrous in our view if the Crown was required to lay a separate count in respect of each. There remains to be answered the

further question posed by Lord Morris - was it fair in the circumstances?

As to this we have already indicated our view that, having regard to the explanations given by each appellant to the police and the manner in which their separate defences were run no embarrassment or prejudice or failure of justice to the appellants was occasioned by the laying of a single count of receiving albeit the evidence disclosed several acts of receiving at different times unknown to the prosecution and from different persons.

There was, in our opinion, no departure from any principle of fairness.

In R. v. Tomlin (1954) 38 Cr. App. R. 82 what appears to have been a special stock taking at the shop which the defendant managed revealed a cash deficiency since the previous stock taking. The defendant's conviction for embezzlement of the aggregate amount on a date between the two stock taking was upheld. The Court of Criminal Appeal said at pp. 89-90 :

" We desire to make it plain in conclusion, agreeing therein with Lynskey J., R. v. Lawson (1952) 36 Cr. App. R. 30 that in the ordinary case, where it is possible to trace the individual items and to prove a conversion of individual property or money, it is undesirable to include them all in a count alleging a general deficiency.

What we are not willing to do is to elevate a rule of practice, applicable to circumstances where it may be required to avoid injustice, into a rule of law applicable to circumstances where it will defeat justice."

We regard what is said in the last paragraph of that quotation as being entirely appropriate to the present circumstances.

We would add that we do not regard section 123(j) of the Criminal Procedure Code, which, in the case of embezzlement and like offences, authorised the charging of the gross amount of property and relaxes the general rules as to specification of dates, as providing an implication which should prevent this court from following the principles in Merriman's case. It would be wrong, we think, to regard the subsection as excluding the development of a common law principle otherwise applicable.

For the reasons we have given we hold that the trial judge was correct in refusing the applications to quash the various counts and these grounds of appeal fail.

The first, second and fourth appellants all include in their grounds of appeal one set out under the heading "wrong and inadequate directions as to the evidence of accomplices". Third appellant was not affected by the evidence of any accomplice and accordingly made no submissions on the subject.

In dealing with this aspect of the appeal there are two questions requiring determination:

- (1) Which of the witnesses could properly be described as coming within the term "accomplice";



- (2) Did the summing up by the learned trial judge properly and adequately direct the assessors on the subject of evidence by accomplices generally, and of the necessity for corroboration of that evidence?

With regard to the first question there can be no doubt that the ten persons, employed either by Burns Philp or Morris Hedstrom, who stole from their employers goods which they sold to some of the appellants, and were subsequently convicted and imprisoned on charges of theft, can properly be regarded as accomplices. Of these seven - Watisoni Toga, Rudolph Evans, Atunaisa Milo, Vilimone Vonotabua, Josefa Delana, Paulo Bete and Waisea Delana, gave evidence that they supplied stolen goods to the first appellant; two, Jovilio Nabukeke and Paula Rayasi, that they had sold stolen goods to the fourth appellant; and two, Waisake Buidole and Rudolph Evans, that they had done so to the second appellant. None of these convicted thieves gave evidence directly inculcating the third appellant.

It was strongly urged by Mr. Koya that Semisi Nabola, a former employee of Burns Philp, who had been dismissed because he had stolen some goods belonging to the company, should also be treated as an accomplice. In his evidence Semisi deposed that the first appellant asked him to pass on a message to the thieves from Burns Philp, that he would pay them \$200 each if they did not reveal that he had bought stolen goods from them. Semisi saw the persons indicated, and passed on the message from first appellant, who gave Semisi about \$13 for his trouble. Mr. Koya's contention was that in

the circumstances Semisi could properly be described as an accessory after the fact, and accordingly came within the definition of "accomplice".

As to what constitutes an accessory after the fact reference should be made to the judgment of the House of Lords in Sykes v. D.P.P. (1961) Cr. App. R. 230 at p.247 per Lord Denning:

"The classic definition of an accessory after the fact is when a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon. These are all active acts of assistance from which it can be inferred that he has assented to the felon going free ... but it has been said that, to make a man an accessory, the assistance must be given to the felon personally, in order to prevent or hinder him from being apprehended or tried or suffering punishment; so that if the assistance was not given the felon personally, but only indirectly by persuading witnesses not to give evidence against him ... he would not be guilty as an accessory after the fact."

Adopting these principles we conclude that Semisi could not be regarded as an accessory after the fact. Accordingly the learned trial judge was in our opinion correct when he did not include the witness Semisi Nabola within the category of accomplices in the course of his summing-up on the necessity for corroboration.

It is a well established principle that, in a criminal trial where a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the judge to warn the jury that though they may convict on his evidence it is dangerous to do so unless it is corroborated: Davies v. D.P.P. (1954) A.C. 378 (H.L.).

The learned trial judge's summing up on the subject was in these words:

"Because they are accomplices I have to warn you that, although you may convict on their evidence, it is dangerous to do so unless it is corroborated. Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. It must be evidence which implicates the accused, that is, confirms in some material particular not only the evidence that the crime has been committed but also that the accused committed it. For example, in the context of the present case if you are satisfied that the goods found in possession of any of the accused are part of the clothing stolen by the thieves you may treat such evidence as corroborative of the evidence of the thieves and in relation to that particular accused. Similarly you may treat any independent evidence of attempts by any of the accused to interfere with any prosecution witnesses in this case as corroborative of the evidence of the thieves against that particular accused. However, this is a matter entirely for you."

This direction of the general principle to be applied to the evidence of accomplices was thus strictly in accordance with the recognised authorities, though we will shortly add a word on the subject of the reference to goods found, as part of the corroboration.

The question then arises as to what can properly be accepted as corroboration. It is clear that in the last passage cited from his summing up the learned trial judge refers to the evidence of Semisi Nabola, whom he - correctly in our opinion - described as an independent witness, as to the attempts by the first appellant to induce the thieves not to reveal the identity of the person to whom they

had sold the stolen goods. This in our opinion can definitely be considered corroboration, if accepted, of the evidence that the first appellant had received the stolen goods knowing them to have been stolen.

One argument put before us with some force by Mr. Koya was that one accomplice cannot corroborate another; as is said in Archbold 38 Edn. paragraph 1428:

"the evidence of one accomplice cannot be corroborated by the evidence of another: R. v. Baskerville (1916) 2 K.B. 658."

That however can no longer be held to be of universal application since the decision of the House of Lords in D.P.P. v. Kilbourne (1973) 57 Cr. App. R. 381 in which it was held that there is no general rule of law that witnesses of a class requiring corroboration cannot corroborate one another. In the headnote it is stated:

"There is no general rule that a person who comes within the definition of an accomplice cannot corroborate another accomplice. Although in many cases accomplices are incapable of corroborating each other, the rule does not apply to accomplices who give independent evidence of separate incidents where the circumstances are such as to exclude the danger of a jointly fabricated story."

The effect of that judgment in the present case is that the evidence of one convicted thief may be held to corroborate that of another convicted thief provided that the purport of that evidence falls within the definition of what constitutes corroboration, in the legal sense. In no case does the

evidence of one accomplice here refer to the same individual act of receiving as that deposed to in the evidence of another; but it does in each case go to show the system in operation between thief and receiver. Lord Hailsham L.C. in his judgment in Kilbourne's case says at page 404:

"The reason why accomplice evidence requires corroboration is the danger of a concocted story designed to throw the blame on the accused."

Here there is nothing to indicate that any of the stories were concocted. In fact the position is exactly that set out in the headnote above cited; here the accomplice gave independent evidence of separate incidents where there was no danger of a jointly fabricated story. In the Kilbourne case at page 420 Lord Simon says:

"Corroboration is therefore nothing other than evidence which confirms or supports or strengthens other evidence; it is, in short, evidence which renders other evidence more probable."

In that case it was held that evidence of other similar acts was admissible as tending to prove a system and that this amounted to corroboration in the strict sense of that term. In the present case it can properly be said in our opinion that evidence from one person of the purchase from him of stolen goods by a buyer can properly be accepted as corroboration of the evidence of another person that he has sold stolen goods to the same buyer. This would then fall within the category of that referred to in Archbold 38th Edn. 1434 (iii):

"Evidence which is admissible under the similar fact principle may also constitute corroborative evidence."



It would, to adopt the words of Lord Reading in R. v. Baskerville (supra) be some additional evidence rendering it probable that the story of the accomplice was true.

In the passage we have quoted from the summing up the learned judge directed that the assessors might, in the context of this case, treat the finding of the goods in the possession of any of the accused as corroborative of the evidence of the thieves. Authority for this is to be found in R. v. Birkett 173 E.R. 694, a judgment which has been cited with approval in many subsequent cases. It was there held that the finding of stolen goods at the house of the accused, where the accomplice said they would be found, is confirmation of the accomplice's story. The later reported cases have, in general, dealt with what are referred to in the judgments as "recently stolen goods", and we would agree that in general the time which had elapsed between the date of the theft and the proof of possession would be a factor in assessing the weight to be attached to any such evidence.

In our opinion there was ample evidence which could be relied upon by the assessors as corroboration if they saw fit. These grounds of appeal have no merit.

In a number of grounds of appeal the learned judge's summing up in relation to the doctrine of recent possession was criticised. The matter is particularly important in the case of the third appellant against whom there was virtually no evidence beyond his possession of the goods. The doctrine is less important in the cases of the first and second appellants,

though it is relevant, and it plays no part at all in relation to what now remains of Count 7, against the fourth appellant.

A convenient brief statement of the doctrine may be taken from Adams on Criminal Law and Practice (2nd Edn.) para.1763, where he says that the doctrine is rather a rule as to circumstantial evidence than one relating to the substantive criminal law. He summarises the rule (so far as is relevant for present purposes) as follows, at para.1763:

".....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;"

As the author points out it is more accurate to speak of "possession of recently stolen goods".

To illustrate the approach of the courts to the question of summing up in relation to this doctrine we quote from cases cited in argument. The first is from R. v. Schama and Abramovitch (1914) 11 Cr. App. R. 45, at 49:-

" Where the prisoner is charged with receiving recently stolen property, when the prosecution has proved the possession by the prisoner, and that the goods had been recently stolen, the jury should be told that they may, not that they must, in the absence of any reasonable explanation, find the prisoner guilty. But if an explanation is given which may be true, it is for the jury to say on the whole evidence whether the accused is guilty or not; that is to say, if the jury think that the explanation may reasonably be true, though they are not convinced that it is true, the prisoner is entitled

to an acquittal, because the Crown has not discharged the onus of proof imposed upon it of satisfying the jury beyond reasonable doubt of the prisoner's guilt. That onus never changes, it always rests on the prosecution."

In R. v. Brain (1918) 13 Cr. App. R. 197 there is the following passage at p.199:-

"What 'recent' stealing is depends on the character of the goods. Some naturally change hands quicker than others. But after the presumption has been raised it is still the duty of the judge to tell the jury that it is only a presumption which calls for some explanation by the prisoner. If he gives no explanation or one which the jury do not believe, the jury may presume that he is the person who stole the property or received it knowing it to have been stolen. The jury may presume this, but the burden of satisfying them that they ought to do so still rests on the prosecution."

There is a short passage in the judgment in R. v. Leoni Sbarra (1918) 13 Cr. App. R. 118, 120:-

"The Court desires to express the law in the following terms. The circumstances in which a defendant receives goods may of themselves prove that the goods were stolen, and further may prove that he knew it at the time when he received them."

The short judgment in R. v. Aves (1950) 34 Cr. App. R. 159, 160 may be a useful guide though we do not take it as laying down an authoritative rule as to the order in which a judge must deal with various matters in his summing up. It reads:

"Where the only evidence is that an accused person is in possession of property recently stolen, a jury may infer guilty knowledge (a) if he offers no explanation to account for his possession, or (b) if the jury are satisfied that the explanation he does offer is untrue. If, however, the explanation offered is one which leaves the jury in doubt as to whether he knew the property was stolen, they should be told that the case has not been proved, and therefore the verdict should be Not Guilty.

I may add this as an addendum to the formula above stated: If there is evidence that prisoner was in possession of property recently stolen and other evidence as well which tends to show guilty knowledge, then the Chairman should direct the jury so far as they are dealing with recent possession in the terms which I have mentioned, and then go on to deal with the other evidence against the prisoner, if there is any, which may or may not be consistent with the explanation, if any, which he has given."

The learned judge obviously had the question of recent possession very much in mind. The first detailed direction he gave on the subject was while dealing with the case against the second appellant. He said:-

" On this question of guilty knowledge the prosecution relies on what is known as the doctrine of 'recent possession'. The doctrine is this - If an accused is found in possession of goods recently stolen, in the absence of any explanation about his possession of those goods or if an explanation is given which is untrue or unsatisfactory an inference may be drawn that the accused knew at the time he received the stolen goods that they were in fact stolen and that he intended to deal with them dishonestly. This inference varies in strength according to the proximity in time between the possession and the theft. Thus what

constitutes 'recent possession' within the meaning of the doctrine is a question of fact depending on the circumstances of the particular case.

The question for you is whether the possession of allegedly stolen clothing by the 2nd accused was 'recent' in terms of the dates between such possession and when the thefts of property from Morris Hedstrom Limited allegedly occurred. If you accept the evidence of Vilimone Vonotabua about the thefts and the evidence of Catherine Chang about the large shortfall in stock, it would appear that the thefts of clothing were committed during 1976 and early 1977. The 2nd accused was found in possession of allegedly stolen clothing on 5th April, 1977. Having regard to the size and secret nature of the operation concerned, you may think and this is a matter for you that the 2nd accused's possession of allegedly stolen property was sufficiently recent for the doctrine of recent possession to be applied to the circumstances of this case.

If the doctrine applies as you may think it does, then it becomes incumbent on the 2nd accused as a matter of common sense, though not as a matter of law to explain how he came to be in possession of stolen clothing. If the 2nd accused is in your opinion unable to give an explanation which might reasonably be true, then it is permissible for you to draw the inference that the 2nd accused received the stolen clothing knowing it to be stolen. Let me put this in another way. If the 2nd accused gives no explanation or if he gives an explanation which you consider to be untrue or unsatisfactory, then it is open to you to infer from such absence of explanation or from the unsatisfactory nature of the explanation that the 2nd accused knew at the time he received it that the clothing was stolen and he intended to deal with it dishonestly."

This is a very full direction. It does not, in dealing with the question of what possession is "recent" go into the usual distinction between things which pass easily from hand to hand and those which do not. There was no need



to do so. Each of the articles in question would have passed easily from hand to hand individually, but the very mass of them in total, to which we have already referred, together with the fact that they were found in a shop for the purpose of sale, negatived any idea that they had been passed from hand to hand. Identified as coming from one of two owners and in such quantity, the idea of casual purchase could be disregarded. Some complaint has been made about the following words in the passage from the summing up which we have quoted -

" then it becomes incumbent on the 2nd accused as a matter of common sense, though not as a matter of law to explain how he came to be in possession of stolen clothing."

Mr. Lindsay, for the respondent, points out that the words "as a matter of common sense, though not as a matter of law" appear in Cross on Evidence (4th Edn) p.43 based on R. v. Wood (1911) 7 Cr. App. R. 56. Also that in Director of Public Prosecutions v. Nieser [1958] 3 All E.R. 662 the doctrine is described thus, at p. 668:

"It is a convenient way of referring compendiously to the inferences of fact which in the absence of any satisfactory explanation by the accused may be drawn as a matter of common sense from other facts, including, in particular, the fact that the accused has in his possession property which it is proved had been unlawfully obtained shortly before he was found to be in possession of it."

To remind the assessors of what common sense entails is not, in our judgment and in this context, a misdirection on onus. In passing we note the use of the phrase "satisfactory explanation" in the passage last quoted.

In summing up the case against the third appellant the learned Judge said:-

" However, if you are satisfied that the clothing concerned or some of it is stolen property belonging to Morris Hedstrom Limited, you must go on to consider whether the 3rd accused knew at the time he received it that such clothing was stolen and whether he intended to deal with it dishonestly. On this aspect of the matter the prosecution relies on the 'doctrine of recent possession' which I have already explained in dealing with the case relating to the 2nd accused. Thus, if you accept that the clothing concerned or some of it was in point of fact recently stolen and the 3rd accused is unable to give an explanation which might reasonably be true as to how he came to be in possession of stolen clothing it is permissible for you to infer that he received the clothing knowing it to be stolen. In other words, if the 3rd accused gives no explanation or if he gives explanation which you consider to be untrue or unsatisfactory it is open to you to infer from such absence of explanation or from the unsatisfactory nature of the explanation that 3rd accused knew at the time he received it that the clothing was stolen and that he intended to deal with them dishonestly."

Mr. Kapadia for the third appellant made much of the learned judge's use of the word "unsatisfactory" which, in his submission was a misdirection on onus, inasmuch as it indicated to the assessors that the appellant had to satisfy them that the explanation was true. He linked this to the use of the word "credible" in this sentence:-

"If you accept that to be the case, the next question that arises is whether the explanation given by the 3rd accused for his possession of items allegedly belonging to Morris Hedstrom Limited and forming the subject-matter of the fourth count is credible."

Similarly the word "believable" in -

"Therefore what you are really concerned with is whether the 3rd accused' explanation about his relationship with him (i.e. Mikaele) is believable having regard to all the circumstances of this case. In the same way you must evaluate his explanation about his alleged exchanges of garments with tourists and decide whether it is believable having regard to all the circumstances of this case."

Mr. Kapadia further submitted that the summing up was lacking in a direction to the assessors that it was enough if they considered that the explanation of an accused "may" be true so as to raise a reasonable doubt.

Strongly though this argument was put forward it does not, in our judgment, meet with success. It is accepted that a summing up must be read as a whole. Whether the explanation of the third appellant as to the missing stock was credible, and whether his explanation of his relationship with Mikaele was believable were indeed two questions which the assessors had to consider. As in all other questions they were aware that they had to give the benefit of any reasonable doubt to the appellant. In addition to an early general direction on onus the learned judge took care to remind the assessors of it in discussing each count. In the case of Counts 1, 2, 3 and 4 he reminded them twice, first in relation to proof of ownership and second in relation to proof of guilty knowledge. Mr. Kapadia has argued that these directions are too remote but we do not agree; by repetition they would make a firm impression on the minds of the assessors.

As to the specific directions on recent possession which we have set out above, they must be read in conjunction with the general directions. But in any event the passages complained of, containing the word "unsatisfactory" were in each case specifically linked with the earlier sentence - "If the second (or third as the case may be) accused is in your opinion unable to give an explanation which might reasonably be true, then it is permissible for you to draw the inference that the second accused received the stolen clothing knowing it to be stolen." In our opinion, read as a whole the summing up is sufficient in and for the proved circumstances of the case. Such grounds of appeal as are directed to this aspect of the matter therefore fails.

Counsel for the appellants submitted that the trial judge in his general directions at the beginning of the summing up, and when he dealt with the evidence affecting each appellant, misdirected the assessors on the matter of the identification of goods. The trial judge in his opening remarks to which exception is taken said :

" In other words, it is permissible for you as a matter of inference to conclude from a positive identification of certain items among similar items which have been found together during a police search that those similar items belong to the same ownership as those which have been properly identified. However, this is a matter entirely for you."

It is necessary to examine the context in which this statement appears and upon an examination of this part of the summing up it is clear that the trial judge instructed the assessors that on the question of identification

of goods alleged to have been stolen it was first requisite that the goods be identified with certainty as belonging to either Morris Hedstrom or Burns Philp. The learned judge said this :

" On the question of identification of goods alleged to have been stolen it is necessary that the goods concerned are identified with certainty as belonging to either Morris Hedstrom Limited or Burns Philp Limited. You cannot convict unless you are satisfied that some of the goods, the subject-matter of the charge, have been properly identified as being owned by either Morris Hedstrom Limited or Burns Philp Limited."

The learned judge in respect of each appellant made two lists of the goods alleged to have been stolen. He divided the goods into two categories. The first category consisted of merchandise of the same or similar description as that sold by Morris Hedstrom Limited or Burns Philp Limited but lacking any special or distinguishing features. The second category concerned items which the witnesses from Morris Hedstrom or Burns Philp Limited had described as having certain special distinguishing features about them, such as having thereon the marks or handwriting of the identifying witnesses or other recognisable evidence which tended to positively establish that the goods came from either Morris Hedstrom or Burns Philp Limited. The trial judge directed the assessors that once they are satisfied that certain items had been positively identified as belonging to either Morris Hedstrom or Burns Philp then in respect of other items in the same batch of similar description and design it was permissible for the assessors to conclude as a matter of inference from the positive identification of



the certain items, that the similar items belonged to the same ownership as those positively identified.

The trial judge was telling the assessors that they were permitted to draw as an inference from the evidence that once they had satisfied themselves that certain goods had been positively identified as belonging to Morris Hedstrom and Burns Philp other goods of a similar description and design may well be considered by them as belonging to the same ownership. The learned judge concluded his remarks by saying - "however this is a matter entirely for you."; thereby the trial judge was leaving the matter in the hands of the assessors for them to decide whether after having seen the goods and heard the evidence they were prepared to infer that goods of a similar description and design belonged to the same ownership as those positively identified as belonging to Morris Hedstrom and Burns Philp. The evidence, the circumstances surrounding the finding of the goods, the explanations given by the appellants as to their possession of the goods, and, by no means the least, the actual physical inspection of the goods would all have been considered by the assessors in deciding the issue of identification. In Wills on Circumstantial Evidence 7th Edn., at p.240 the learned author says:

" It is not, however, necessary that the identity of stolen property should be invariably established by positive evidence. In many such cases identification is impracticable; and yet the circumstances may render it impossible to doubt the identity of the property, or to account for the possession of it by the party accused upon any reasonable hypothesis consistent with his innocence; .....

The trial judge painstakingly examined the evidence for and against each appellant and as we have said, prepared two lists categorising the goods. In the case of each appellant the trial judge directed the assessors in a manner similar to the direction given in his opening and which we have quoted. We do not intend to repeat each direction given by the trial judge in respect of each appellant on this matter of similarity of goods, as they were all substantially the same. It will suffice if we quote the passage relating to the first appellant:

" Catherine Chang (P.W.12) gave evidence in regard to the identity of items in these cartons. I think (and this is a matter for you) her evidence relating to the identity of items in the cartons concerned may be divided into two separate categories. The first category consists of items which she has described as merchandise of the same description as those sold at Morris Hedstrom Limited without any special or distinguishing features about such items or about the boxes in which some of them are contained or about the brand names or price tags attached to the items. It will be for you, gentlemen, to decide for yourselves whether or not those items considered in the light of other evidence relating to the first accused do in fact belong to Morris Hedstrom Limited as claimed by the prosecution.

The second main category consists of items which Miss Chang has described as in addition to being merchandise of the same description as those sold at Morris Hedstrom Limited, they also have certain special or distinguishing features about them."

This question of identification of similar goods came before the Full Court of Victoria in Rex v. Schiffmann and Brown (1910) V.L.R. 348. At p.354 A'Beckett J. said :

".....It is not necessary that there should be an absolute identification. If such a necessity existed it would make a successful prosecution almost impossible with regard to many commodities which are often the subject matter of theft and which exist in large volume, and as to which it is impossible to say that any one unit (any one bottle of beer or any one case with a certain label, for example), is the particular thing which the person alleged to have been robbed had in his possession, and could identify as that particular thing. He can only say that he missed a thing of that description under circumstances suggesting theft, and that this which is found is similar. Then each case must depend on its own circumstances and the mere possession of that which is similar to a thing which has been stolen would not of itself be sufficient to justify a conviction. On the other hand, if the similar things are found under circumstances which make a connection between them and the things supposed to have been stolen in such a way as to make it reasonably probable that they are the same things, the conclusion that they are the same things is one at which the jury is at liberty to arrive, although there is mere similarity in the things themselves. All the circumstances must be taken into account - the circumstances under which they were found, the place in which they were found, and whether or not the person in whose possession they were found would be, ordinarily in his business, the possessor of goods of that kind, and also any explanation given by the accused in relation to those goods which, on account of being false or absurd, would negative the supposition that they are honestly obtained."

Accordingly having regard to what the trial judge said and the context in which it was said we are clearly of the opinion he was quite justified in inviting the assessors to draw an inference, if they were so satisfied on the evidence, that goods being of a similar

description and design to those which had been positively identified as belonging to Morris Hedstrom and Burns Philp could likewise be considered as belonging to those firms.

Every summing up must be regarded in the light of the conduct of the trial. On appeal to this Court we are not required to consider whether this or that phrase was the best which might have been chosen or whether a direction which has been attacked might have been fuller or more conveniently expressed. It would be a rare occurrence indeed if the summing up was not open to some objection or lacked perfection, but we are satisfied that there was no misdirection by the trial judge on the matter of identification of goods and the inferences the assessors were entitled to draw.

Accordingly this ground of appeal fails.

A further ground of appeal put forward by counsel for the third appellant is that the learned trial judge failed to put the third appellant's defence adequately to the assessors and that he passed to the assessors adverse comments on the third appellant which were not justified by the evidence.

The defence of the third appellant which counsel contends was not fairly put to the assessors was set out in his evidence given at the trial. Summarised, this was to the effect that some of the goods said to have been stolen were bought by him from a Fijian man and were transported to his shop in a Morris Hedstrom van and sometimes by the man personally. Other goods were bought at sales held at different shops in Suva and some were bought from local

merchants whom he named in his evidence. He further deposed that he might have received invoices or receipts but it was not the practice of this firm to keep them.

In the course of his summing up the learned trial judge gave in detail to the assessors a full and accurate account of the evidence given by third appellant at the trial. This was admitted by counsel in his argument; but counsel went on to contend that merely reading out the appellant's statement and quoting from his evidence was not enough, without directing the assessors that the point they had to decide was whether the appellant's possession of garments was innocent as he claimed.

The subject of the learned trial judge's summing up on the issue of the explanation required from a person found in possession of stolen goods, is dealt with elsewhere in this judgment. On the general ground that the defence of the third appellant was not adequately put to the assessors we are of opinion that the learned judge could hardly have given a fuller direction than he did. He referred in detail to the whole of the third appellant's evidence upon which his defence had necessarily to be founded. A little later in his summing up he reminds the assessors of all the third appellant had said regarding the goods found in his shop and pointed out to them :

"Third accused said when he bought the clothing concerned from the Fijian man and local merchants he did not know or believe that the clothing was stolen nor did he have any cause to believe that it was stolen."



This definitely directed the attention of the assessors to the question of the possible innocence of the third appellant in the matter of the possession of the goods. It is well established that no obligation lies on the trial judge to explain the defence case in detail. As was pointed out in R. v. Raymond (1956) N.Z.L.R. 527 on page 531, a detailed direction on the case put forward by the defence might well be prejudicial to the accused.

Objection was also taken to the use in the course of the summing up to the phrase "part of the criminal transaction between third accused and Mikaele". Standing by itself that phrase might well be open to criticism; but in the context in which it was used we do not think that it conveyed to the minds of the assessors that in the trial judge's opinion the third appellant was a criminal. In any event the learned judge said at the commencement of his summing up:

" If I express an opinion on the facts or if I appear to express an opinion, my own opinion, then it is entirely a matter for you whether to accept what I say or form your own opinion."

We are unable to agree that what was stated by the learned trial judge in his summing up on this point went far beyond fair comment as is contended by counsel for the third appellant.

In our view it cannot be said that the learned judge failed to put the appellant's real defence to the assessors or that he invited them to form an adverse opinion about him. Accordingly this ground of appeal also fails.

Having regard to our rejection of the various grounds of appeal and the views we have expressed, it follows that, except in the case of the fourth appellant there is no ground or reason for this court to interfere with the findings of the assessors and the Supreme Court on the facts, and the convictions of the first, second and third appellants must stand. Their appeals against conviction are dismissed. As to the fourth appellant Count 7 charged the clothing and the electric fans as separate items and the expression of the assessors' opinion that the fourth appellant was guilty extended to both. The reasons we have given for rejecting the conviction as to the clothing do not apply to the electric fans, and there is no reason why the conviction should not stand in relation to them. The conviction of the fourth appellant on Count 7 is therefore affirmed but restricted to the items of four electric fans.

There is an appeal against sentence in each case. The first appellant was sentenced to concurrent terms of six years' imprisonment on each of Counts 1 and 2, and the second, third and fourth appellants to six years' imprisonment on Counts 3, 4 and 7 respectively. The learned judge took into consideration all the personal factors involved, the comparative youth of the appellants, the humiliation and shame arising from family factors, in that they are members of well known and closely knit Gujarati families. The learned judge's basic reason for fixing heavy sentences was expressed as follows -

" It is abundantly clear from the evidence that during a period of about two years before they were caught the four accused had been involved in a scheme for receiving goods from employees of Morris Hedstrom Limited and Burns Philp Limited. The accused operated this

criminal organisation so well and effectively while it lasted that they could not but be regarded as 'professional' receivers. The law takes a very grave view of such receivers because through their efficient method of operation they provide the necessary 'fence' for thieves to carry on and extend their own particular brand of criminal activity. The existence of an organisation such as that operated by the accused persons must be inimical to society as it breeds more and more crimes. Viewed in this light the seriousness of the offences committed by each of the accused becomes only too apparent."

In the case of the first, second and fourth appellants and as the convictions then stood, the approach of the learned judge was entirely justified on the evidence. As between these three a scheme for receiving stolen goods was clearly manifested (Mr. Koya's submission to the contrary notwithstanding) though it may well be that the part played by the second appellant, as an employee was minor by comparison. In the case of the latter Mr. Lindsay did not press his submissions for maintenance of the sentences as he did for the others. The alteration of the conviction of the fourth appellant has also now to be considered.

Mr. Kapadia, for the third appellant, made a strong submission that the learned judge was wrong to regard the third appellant as being involved in any scheme. There is certainly no evidence connecting the third appellant with the others in any way relating to the obtaining of the goods of Morris Hedstrom to the value of \$6,278.46. Yet, as has been found, he did obtain those goods, over a similar period of time, and perhaps the only point of difference is that there is

no direct evidence that the third appellant encouraged young men to a dishonest course of conduct in the process.

Before proceeding further it is necessary to consider a sentence passed in the case of R. v. R.K. Patel (Cr. C. No.5 of 1978) which has been relied upon by defence counsel. The accused in that case also operated a shop; he pleaded guilty to receiving a quantity of duty free electrical goods to the value of \$5,864.76. The accused was married and had four children. From the beginning he made a clean breast of the matter and was very co-operative. The stolen property, the subject of the charge, was recovered. He was regarded as one who succumbed to temptation through weakness and was not directly responsible for the larceny of the property. The receiving took place over a period of nearly three months. We have taken those facts from the judgment of the learned Chief Justice who imposed a sentence of twelve months' imprisonment.

The points of difference between that and the present case are that here there had been a deliberate carrying on of trafficking in stolen goods over a much longer period. The learned judge was fully justified in regarding at least the two partners, the first and fourth appellants and the third appellant, as professional receivers even though it was no doubt only a side line. The value of the property found in the possession of the first appellant was \$6,934.66 and of the third appellant, on the count upon which he was convicted, \$6,278.46. None of the appellants made a clean breast of the matter. A very bad feature of the case against the first and fourth appellants is that

they had requested witnesses to obtain goods for them - the only items of which the fourth appellant now stands convicted are the electric fans, but according to Jovilio Nabukeke he stole them at the request of the fourth appellant. As a further example, the witness Paulo Bete said of the first appellant, "He used to nominate the type of clothing to steal." The majority of the "thieves" had no previous convictions until they were charged with those offences and it is apparent that they were all encouraged to dishonesty and as a result have lost their employment.

There is a vast difference between the two cases, but, in making some reductions in sentences we have been influenced in some measure by our consideration of Patel's case, in relation to the principle that, subject to the limits imposed by differing circumstances, uniformity of sentence is desirable.

In our opinion the first appellant is one of the worst offenders but the sentence passed upon him should be reduced in some small measure having regard to that passed in Patel's case. The sentence of six years' imprisonment on Counts 1 and 2 is therefore set aside and a sentence of five years' imprisonment (concurrent) on each of those counts is substituted to run from the date of the original sentence.

Having regard to the considerations we have mentioned in relation to the second appellant the sentence of six years' imprisonment on the third count is set aside and a sentence of three years' imprisonment is substituted to run from the date of the original sentence.



While the third appellant is a major offender, the evidence does not indicate that he directly encouraged any thief; the sentence of six years' imprisonment on Count 4 is set aside and a sentence of four years' imprisonment substituted, to run from the date of the original sentence.

The fourth appellant must have the benefit of the limitation of his conviction on Count 7 to the electric fans. The circumstances nevertheless render his offence a serious one. The sentence of six years' imprisonment on the seventh count is set aside and a sentence of two years' imprisonment is substituted to run from the date of the original sentence.

The appeals against sentence are allowed to the extent indicated above. As we have already indicated the appeals against conviction (except for a variation in the case of Count 7) are dismissed.

(Sgd.) T. Gould  
VICE PRESIDENT

(Sgd.) C. C. Marsack  
JUDGE OF APPEAL

(Sgd.) B. C. Spring  
JUDGE OF APPEAL