A

BRIJ BASI SINGH

v.

B

REGINAM

[COURT OF APPEAL, 1971 (Gould V.P., Marsack J.A., Richmond J.A.), 23rd April, 4th May]

Criminal Jurisdiction

C *Criminal law—principles of criminal liability—theft—taking—animus furandi—if original receipt not tortious or felonious intention to misappropriate subsequently formed does not constitute theft—Court of Appeal Ordinance (Cap. 8) s.22—Penal Code (Cap. 11) ss.291(i), 307—Crimes Act (New Zealand) s.220—Larceny Act 1916 (6 & 7 Geo. 5, c.50) (Imp.) s.1—Theft Act 1968 (16 & 17 Eliz. 2, c.60) (Imp.).*

D The appellant was proved to have been in possession of a cow belonging to the complainant for a number of years and to have dealt with it as his own property. There was no evidence as to how the appellant obtained possession of the animal and the case was not one to which the doctrine of recent possesson could be applied. On appeal by the appellant against his conviction of theft —

E *Held :* 1. It was upon the prosecution to prove every element of the alleged crime beyond reasonable doubt.

2. Under the relevant provisions of the Penal Code it was necessary to show that the appelant either took the cow *animus furandi* or, if the appellant formed an intention to misappropriate the animal at a later stage, that his original receipt of it was not innocent but tortious.

F 3. The acts of ownership by the appellant, while evidence of his then state of mind, did not of themselves constitute theft and there was no finding by the court of trial that the receipt of the animal by the appellant was not innocent.

4. The prosecution had therefore failed to discharge the onus of proof.

Case referred to :

G *R. v. Mathews* (1949) 34 Cr. App. R.55; [1950] 1 All E.R. 137.

Appeal from a judgment of the Supreme Court sitting in appellate jurisdiction.

S. M. Koya and D. S. Sharma for the appellant.

T. U. Tuivaga for the respondent.

H The facts sufficiently appear from the judgment of the court.

4th May 1971

Judgment of the Court (read by Gould V.P.) :

This is a second appeal brought under section 22 of the Court of Appeal Ordinance (Cap. 8) against the conviction of the appellant by a Magistrate's Court of the offence of larceny of cattle, contrary to section 307 of the Penal Code (Cap. 11). The appeal to the Supreme Court was dismissed, and on the present appeal the appellant is confined to grounds which raise a question of law only.

The important facts as found by the learned Magistrate are these. On the 13th February, 1965, the complainant Bidhan Singh entrusted a cow which he owned, to one Savenaca for grazing. It was grazed in the hills with other stock but was missed at some unestablished later date. About the 21st January, 1970, it was found and identified, not actually in the possession of the appellant, but the appellant admitted that he had had it in his possession and given it out at different times to two persons — in the second case it had been for "rent". He claimed it to have been his property from its birth. When the cow was left with Savenaca by the complainant, he branded it with his father-in-law's brand — 2BA. When the animal was found the area where the brand had been was covered by a scar and the appellant's own brand, U5A, was on a different part of the animal. The Magistrate found that the scar had been deliberately made and the other brand put on by the appellant.

The relevant portion of the Magistrate's judgment is as follows :—

> "The charge, however, alleges the offence took place between the 13th February, 1965 and the 22nd January, 1970 and in view of the findings of fact previously made as to ownership, if the accused has dealt with the cow in that period in a manner which constitutes theft within the definition of section 291 P.C. then the offence charged has been committed and it does not matter where it was found. Mr. Yarrow says the brand U5A on the rump is of some standing. The accused in his statement to Indar Jeet Singh says he gave a cow to one Swami Ram Teerath. In his own evidence the accused says he says he gave the cow to Swami Ram Teerath last year. Previous to this he had also given it to one Shyam Baran. In his statement to Const. Daya Singh he said he gave it to Swami Ram Teerath on rent. I therefore hold that on his own admission the accused dealt with cow between the 13th February, 1965 and 22nd January, 1970 in a way which constitutes theft and in addition the finding of rebranding is sufficient to establish the charge, but I have dealt with the finding of the cow and the admissions because of Counsel's argument."

The question for this Court, as we see it, is whether accepting the facts as found, all elements of a charge of larceny have been proved. This is sufficiently raised by the grounds of appeal and involves a question of law.

The pith of the magisterial findings is that the dealings with the cow by the appellant (includng the rebranding) constituted theft. Under the law of at least one Commonwealth territory i.e. New Zealand, that would be so. There, conversion without colour of right, has been imported into the definition of theft in secton 220 of the Crimes Act, 1961, and, as

pointed out in *Criminal Law and Practice in New Zealand by Adams* (1964) p.365 the need for distinctions in relataion to the aspect of "taking" has disappeared. In Fiji, however, the law to be applied is that contained in the Penal Code, section 291 whereof defines theft in the same terms as those of section 1 of the Larceny Act, 1916. (Imp.). In England, the Act last mentioned has been replaced by the Theft Act, 1968, which also eliminates the necessity for a "taking" but which has no counterpart in Fiji. The earlier decisions of the courts therefore remain relevant.

The first portion of section 291(1) of the Penal Code reads —

> "A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof:"

Generally speaking the *animus furandi*, the intent permanently to deprive the owner of the thing stolen, must be held, in order to constitute theft, at the time of taking and carrying away. It has been held that if the receipt of the property has been entirely innocent, in the sense that it was neither felonious nor tortious, the fact that the receiver of the property later changed his mind and misappropriated the property would not turn the receipt of the goods into either larceny or receiving stolen goods. It is sufficient to refer to *R. v. Matthews* (1949) 34 Cr. App. R. 55 as authority for this proposition. If, however, the receipt of the property was tortious (the tort relied upon seems generally to have been trespass) a subsequent intention to appropriate it would turn the receipt into larceny.

It does not seem to us that the learned Magistrate directed his mind to this aspect of the law. There was ample evidence upon which he could find, as he did, that the cow was the property of the complainant and the "dealings" which he relied upon could well be considered evidence that at the stage they took place the appellant was exercising dominion over the cow in question and intended to keep it: by that time, at least, the *animus furandi* had been formed. But the dealings did not, of themselves, constitute theft under the law applicable.

The case was one in which the doctrine of recent possession did not apply. The period of time which had elapsed, vague though it was in a sense, was obviously too great. The prosecution had to rely upon circumstantial evidence to prove every element of the alleged crime beyond reasonable doubt. It was incumbent upon it to show that there was no reasonable inference to be drawn from the proved facts other than that the appellant was guilty.

Can it be said that this was done in relation to the taking of the animal? The possibilities of its having strayed, of its being found by the appellant or by someone else, in the latter case of its having passed from hand to hand and finally to the appellant by purchase or otherwise, the possibility of its having been stolen by someone else and similarly passed from hand to hand, all come readily to mind. It is not for this Court to say whether in none of these circumstances could the appellant have come into

possession of the animal in circumstances other than felonious or tortious. In some such situations the intent at the relevant time of the appellant would be important, as might also the significance of evidence of the practice of branding. The question was for the Court or trial, and, possibly because of a mistaken view of the law, it was not considered. As a result, it has not been found by the Court that the original receipt of the animal by the appellant was not innocent, and in the absence of such a finding, which cannot in any way be regarded as implicit in the judgment of the Magistrate, the prosecution has failed to discharge the onus of proof in a material particular. A B

The appeal must therefore be allowed. We do not advert to the question of the possibility of substituting a conviction for any other offence, as counsel for the Crown specifically put his case as one of larceny or nothing. He has also asked that a new trial should not be ordered. C

The conviction and sentence are therefore quashed.

Appeal allowed.