

IN THE MAGISTRATES' COURT OF FIJI

AT TAVUA

CRIMINAL JURISDICTION

Criminal Case No. 70 - 2017

STATE

-v-

APISAI TAKE

Before : RM Fotofili L.
For The Prosecution : WPC Chand A. [Police Prosecution]
For The Defendant : Ms Henao G. [Legal Aid Commission]
Trial Date : 23rd October 2018 and 25th June 2019
Date of Judgment : 27th August 2019

JUDGMENT

BACKGROUND

1. There were initially 2 defendants in this this case but the prosecution has withdrawn the charge against 1 of them. That defendant has been discharged.
2. The charge [amended on the 23rd of October 2018] remains against Mr. Apisai Take whom will be referred to as the defendant.
3. The defendant has pleaded not guilty to the amended charge which reflects the following allegation:

Statement of Offence

THEFT: Contrary to section 291 of the **Crimes Act 2009**.

Particulars of Offence

APISAI TAKE between the 10th day of March 2017 at Vatia, Tavua in the Western Division dishonestly appropriate stole a brown bull valued \$2500.00 the property of **TASNEEM ALI** with the intention to permanently deprive **TASNEEM ALI** of her property.

4. The defendant first appeared on the 13th of March 2017.
5. He was remanded in custody and was released on bail on the 24th of March 2017.
6. Having secured legal representation, the defendant pleaded not guilty on the 12th of June 2017. At the time, the defendant was charged with his co-defendant for the same charge of theft.
7. The trial was held on the 23rd of October 2018, with the prosecution calling 1 witness on that day.
8. The trial was adjourned to be continued on another day to allow the defence to cross examine the police officer who interviewed the defendant.
9. On the 25th of June 2019, the prosecution indicated that they did not intend to rely on the defendant's answers in his interview with the police.
10. The prosecution then closed their case, relying on the evidence of the witness who gave evidence earlier.
11. The court found that there was a case to answer.
12. The defendant having been advised of his options and having time to discuss with his counsel, he then elected to give evidence and had no other witness.
13. I summarise the evidence adduced during the trial below.

PW1

14. Prosecution witness 1 [PW1] is Ms. Tasneem Ali.
15. She has a business investment at Vatia, Tavua and it is in relation to cattle farming.
16. She is a 4th generation cattle farmer.

17. The farm is 45 acres.
18. The defendant was the caretaker of the farm between 2011 to 2017.
19. When the defendant took over in 2011, there were 35 cows and some calves and bullocks at the farm.
20. Some of the cows were pregnant too.
21. PW1 visited the farm but not as regularly as her husband.
22. PW1 described that when the defendant took over as caretaker, the defendant was helpful and put up and repaired the fence which was damaged by the cows.
23. PW1 began suspecting that the figures or the report provided by the defendant regarding their cattle was being understated.
24. PW1 then informed the villagers nearby to tip her off or alert her if there was anything suspicious.
25. PW1 was advised that some slaughtering of animals happened inside her compound and she reported the matter to police at 9pm on the 10th of March 2017.
26. About 3 hours later at about midnight, PW1 was called by police to identify a bullock in police custody.
27. PW1 explains that 10 months earlier, she obtained a 'breeder'. It was a mixed Bahman and Limousine breed.
28. The bullock she came to identify at the Tavua Police Station was one of her breeders.
29. The breeder at the police station was brown and black in colour or shaded.
30. PW1 had bought the breeder for \$2,600 and over time it would have appreciated in value.
31. The breeder at the station had a visible injury to its chest as if made by a spear or sharp object. There was blood on its skull.
32. The breeder was not branded.
33. PW1 said that she has requested the defendant to brand the breeders but it was not done.
34. PW1 did not consent to the breeder being killed.

35. In cross examination PW1 denied that the defendant had any cow or cattle.
36. PW1 never spoke with the defendant about the defendant having any cow.
37. PW1 accepts that her brand is the shape of a triangle followed with the letters ' TJ '.
38. The cow at the police station was not branded.
39. PW1 maintains that the cow at the station belonged to her.
40. The defendant was paid \$100 as a caretaker.
41. The prosecution then closed their case.
42. Having explained his options to the defendant, the defendant said that he will give evidence and had no other witness.

DW1

43. Defence witness 1 [DW1] is the defendant himself Mr. Apisai Take.
44. He was the caretaker for PW1.
45. He started working as a caretaker from 2013.
46. There were other cows that he looked after, together with PW1's cattle.
47. The cattle belonging to different owners were kept at the same place.
48. The defendant can tell which ones belonged to PW1 because of the brand which was the shape of a triangle followed by the letters ' TJ '.
49. The defendant has his own 2 cows. 1 coloured black and the other, brown. The offspring of 1 of the cows was the 1 at the police station. This offspring was not branded.
50. His cows had his brand which was ' XMK '.
51. The defendant explains that PW1 was staying overseas and when she came back, she made the complaint.

52. The defendant says that PW1 does not know the cattle as well as PW1's husband and the defendant.
53. On the 10th of March 2017 the defendant's brother called the defendant and told him that he needed a cow.
54. The defendant showed his brother his cow and then the defendant left out to sea.
55. The defendant said that his brother killed the cow at 5pm.
56. They killed the cow at the compound.
57. After returning from the sea around 4am, police came to the defendant and arrested him.
58. The defendant was told that another cow had been killed and it was not his cow.
59. At the police station, the defendant was shown the cow being referred to. The defendant said that it was his cow. The cow shown to him at the station had black and white spots.
60. If he stole PW1's cow, the defendant said that he would have taken it away and killed it somewhere else instead of at the compound.
61. In cross examination, the defendant said that he had differences with PW1.
62. He admits receiving \$700 for a bull.
63. He then went to the farm and chose the cattle to be slaughtered.
64. He said that he had to go out to sea by 5pm as the tide was going out.
65. The bull killed belongs to the defendant.
66. His cows are also at the compound.
67. That was the defence case.

BURDEN AND STANDARD OF PROOF

68. I remind myself that the burden is on the prosecution to prove the allegation as the defendant is presumed innocent until proven guilty.

69. Even if I reject the evidence adduced by the defence or from DW1, that does not necessarily mean that the defendant is guilty.
70. I remind myself that the prosecution must satisfy me beyond a reasonable doubt or I must be sure that it is the defendant who committed the offence, before I can find him guilty.

ELEMENTS OF THE OFFENCE

71. The defendant is charged with theft which is contrary to section 291 of the **Crimes Act 2009**.
72. The elements the prosecution are to prove beyond a reasonable doubt are:
 - i. **The Defendant;**
 - ii. **Dishonestly;**
 - iii. **Appropriated property;**
 - iv. **Property belongs to another; and**
 - v. **The defendant intended to permanently deprive the other of the property.**
73. Dishonest is dishonest according to the standards of ordinary people and is known by the defendant to be dishonest [section 290 of the **Crimes Act 2009**].
74. Treating a property as if it was yours without the consent of the owner is tantamount to appropriating the property [section 293 (1) of the **Crimes Act 2009**.
75. Property can include real property or personal property [section 288 of the **Crimes Act 2009**]. A cow or bull can fall into this category.
76. When dealing with the offence of theft, property can be deemed to belong to someone if that person has some proprietary interest or has possession or has control of the property [section 289 (1) (a) and (b) of the **Crimes Act 2009**].
77. Similarly when it comes to the offence of theft, a person can intend to permanently deprive a person of property if the person appropriates the property belonging to another without meaning the other to permanently lose the property and the person's intention was to treat

the property as his or her own to dispose of regardless of the other's rights [section 300 (1) (a) and (b) of the Crimes Act 2009].

78. Intention is when someone means to engage in that conduct [section 19 (1) of the Crimes Act 2009] .
79. Someone's intention can be gauged from surrounding circumstances or circumstantial evidence or from direct evidence such as a confession [Kural v. The Queen (1987) 70 ALR 658] .
80. Offenders can act in support of each other even if they do not ' inflict the blow ' .
81. For instance, section 45 (1) of the Crimes Act 2009 stipulates that a person is deemed to have committed the offence if that person aided, abetted, counselled or procured the commission of the offence.
82. Taking persons to the farm and giving directions for a particular cow to be killed can amount to counselling and procuring the offence.
83. Although the prosecution has not in the particulars of the charge, alleged that the defendant committed the offence with others, evidence that may point towards this emanates from the defendant's own evidence.
84. If for instance, it is accepted that the defendant directed others to kill the cow which the defendant knew did not belong to him, then that could support a finding of guilt for theft.
85. I remind myself that circumstantial evidence can be powerful evidence but it must be considered with care in-order to avoid speculation. The circumstantial evidence must be consistent with the defendant having committed the act or the guilt of the defendant but that also the facts must negative any other reasonable conclusion. At the end of the day, the court must be satisfied beyond a reasonable doubt of the defendant's guilt [Varasiko Tuwai v. The State Criminal Appeal Number CAV 13 of 2015 (26th August 2016) at paragraph 51 to 53.

ANALYSIS

86. Having observed and listened to the defendant give evidence, I was not convinced with his evidence.
87. For instance, he says that he has 2 cows. His cows are branded.

88. He then said that the cow at the police station did not have a brand.
89. He said that the cow at the police station is an offspring from 1 of his 2 cows.
90. If this is true, then he has 3 cows.
91. This is simple and should not be hard to explain.
92. He does not expressly explain why this cow at the station did not have a brand. He seems to be saying that it is an offspring.
93. There is no indication in the evidence that the cow at the police station is not mature or is a calf.
94. The verbal gymnastics given by the defendant to explain that the cow at the police station is his, coupled by his demeanour when giving evidence in court leads me to reject his evidence on this point that the cow at the station is his.
95. I accept the defendant's evidence on other points though. For example that he was at sea around the material time the cow was killed and that police came to him later and took him to the police station.
96. On the other hand, I found PW1's evidence credible.
97. I accept her evidence that she believes that the cow at the police station belongs to her.
98. I do not expect police or the investigators to line up carcasses of animals so that there can be an identification parade to test the accuracy or strength of PW1's identification of the dead cow at the police station.
99. At least photos or a video could have been taken.
100. There is no indication that that was done and none has been tendered during the course of the trial.
101. The exact colour of the cow at the station is disputed.
102. The defendant says that it has black and white spots. PW1 says that it is black and brown or shaded in that colour.
103. PW1 describes that the cow was a mix breed of Bahman and Limusine.

104. There is evidence from the defendant, which I accept, that there were other cows at the compound belonging to other owners.
105. There is evidence from both PW1 and the defendant that the cow at the station did not have a brand.
106. I remind myself that a credible witness can still be a mistaken witness.
107. In totality, I am not sure whether PW1 is correct in her identification of the carcass at the police station and whether it belonged to her, no matter how strongly she believes it.
108. I am not satisfied beyond a reasonable doubt about who is the owner of the cow that was killed.
109. The prosecution's case fails in that regard.
110. Ownership has not been proven.
111. Proving ownership has a bearing on all other elements. Since ownership has not been proven, all other elements fails *ipso facto*.

CONCLUSION

112. For the reasons I have explained above, the elements of the offence has not been proven beyond a reasonable doubt.
113. I acquit the defendant of the charge.
114. I remember being informed during the course of the trial that the carcass has been disposed off or buried by police after it was identified by PW1 but I do not have that information reflected in my notes or in the court record.
115. I doubt that police would have refrigerated or kept the carcass all these years while the case is pending.
116. I will recheck with the parties after this and an order for disposal or some other order pursuant to section 155 of the **Criminal Procedure Act 2009** may be made.
117. 28 days to appeal



At Tavua this 27th day of August 2019.

LISIATE T.V FOTOFILI

Resident Magistrate