

IN THE SUPREME COURT)
 OF THE TERRITORY OF)
 PAPUA AND NEW GUINEA)

BIGNOLD J.

Apr. 1949.
 Higaturu.

THE KING v. RONALD JAMES FRASER AND IJIMBARI
(alias JIMMY of Koninaturu Village)

JUDGMENT

In this case the two accused Ronald James Fraser and Ijimbari (also known as Jimmy) are jointly charged that on or about the first day of October 1948 in the Territory of Papua they stole ten drums of petrol the property of the Commonwealth of Australia or of the Provisional Administration of the Territory of Papua-New Guinea.

The facts, which do not seem to be disputed, are briefly as follows:

The European accused Fraser is engaged at Oro Bay in the business of collecting and preparing for shipment disposal goods, but there is no evidence before the Court as to whether he engages in this business on his own account or for an employer.

On Friday 1st October 1948 accompanied by the accused Ijimbari and another native named Jei the accused arrived in a truck at Poro Village at about eight o'clock in the morning, where in the grass close by and between the Emboga and Samboga River the accused Ijimbari guided Fraser to ten drums of benzine lying off the road in the grass.

It appears that this benzine had some marks on the drums, which were painted red and blue, but no evidence was adduced as to the nature of the marks.

The accused Fraser placed some timber on the truck and assisted by Jei rolled the ten drums up into the truck, which was then driven to the work shop of the accused Fraser at Oro Bay where the drums were unloaded, but there is no evidence to show where these drums can now be found.

The evidence shows that the drums were brought into the area after the commencement of the war and had been lying hidden by the grass for about three months. There is nothing to indicate how the drums got into the grass where the accused Fraser guided by the accused Ijimbari obtained them.

Mr. Patrol Officer Tomasetti gave evidence of interviewing the accused Ijimbari on the 7th January last. He informed the accused Ijimbari that he was inquiring into the disappearance of a quantity of petrol from near Poro village and after due caution this accused admitted that he had guided Fraser to the place where the drums lay in the grass and that they were loaded on to the truck and taken by Fraser to Oro Bay and dumped at Fraser's work shop. Ijimbari continued that shortly afterwards Fraser paid him about three pounds for the petrol.

The statement to the police by the accused Ijimbari, of course, is not evidence against the accused Fraser, but Tomasetti went on to say that on the 10th January 1949 he interviewed Fraser and said to him: "I am investigating the disappearance of some benzine from a site between the Emboga and the Samboga Rivers and as a result of information I have received I want to ask you some questions. After being duly cautioned the accused Fraser quite frankly admitted collecting the petrol from the place mentioned and giving the accused Ijimbari three pounds for it."

Mr. Patrol Officer then asked the accused Fraser if he knew that the petrol was Commonwealth property, to which question the accused replied, "No". The Learned Crown Prosecutor then closed his case after tendering two Papua-New Guinea Government Gazettes - one being No.17 of 1946 containing a notice as to Disposals Property and the other No.18 of 1948 which bore date the 13th August 1948, and contained a Notice in the following terms:-

PURCHASE OF UNITED STATES PROPERTY IN PAPUA-NEW GUINEA

It is notified for public information, that the Commonwealth Government has purchased from the United States Government title to all United States property located in the Territory of Papua-New Guinea, except property the subject of a prior sale. The public are warned against any unauthorized interference with any of this property.

Dated the twelfth day of August, One thousand nine hundred and forty-eight.

R. MELROSE,
Acting Government Secretary. "

The accused Fraser elected to call no evidence but to make a statement which he did in the following terms:

" It was inferred that the petrol had been purchased. The transaction was done quite legitimately with no intention of stealing thought of at the time of the transaction. The transaction was done quite openly and not secretly and myself in my own mind was satisfied that the transaction was quite legal. "

The accused Ijimbari followed a like course, his statement being as follows:

" I sleep in my garden and in the morning at 7 o'clock the accused came in his truck. The boss boy Jei called to me 'Where is the petrol'. I said 'It stops along inside the grass.' I got on the truck with Taubada (accused Fraser) and showed him the petrol inside the grass. He said, 'How many drums'. I said 'ten drums'. He said, 'Number one, how much do you want for pay?' I said, 'I do not want money something belong you.' He took hard wood timber and Jei and Taubada rolled them along motor car. They took it straight to Oro Bay and at Oro Bay they put the drums outside a shed - I sat inside the shed. Taubada went off to have a bath and after dinner he took some money and brought it straight to me. I said, 'Taubada I want to buy trade tobacco.' Taubada said, 'It belongs to boys, I can't sell him.' I said, 'All right, I go buy it at Bunting's store.' He said, 'All right, you buy it quick and come back along motor car.' I came straight to Poro village and slept in my garden."

The Court has been careful to relate those statements each exclusively to the maker of the statement.

The learned Crown Prosecutor addressed first urging that upon the question of the intention at the time of taking both accused must be taken to have knowledge of the Gazette Notices tendered by him, but he very properly admitted that such an inference must be weak on the case of the native accused.

Each accused declined to address.

This brings the Court to examine the charge in the light of the evidence adduced, bearing in mind always that the Crown has the burden of proving its case beyond a reasonable doubt and once a reasonable doubt exists the accused is entitled to an acquittal. Also recalling that an accused may give an account which is not believed by the Court and yet such an account might raise a doubt, which might entitle him to be acquitted.

The evidence is clear beyond doubt that on or about the date alleged in the indictment the accused Ronald James Fraser and the accused Ijimbari did in fact remove from the grass between the Emboga and the Samboga Rivers ten drums of petrol.

The next point which arises (and which the Crown must prove beyond a reasonable doubt) is: Was the petrol the property of the Commonwealth of Australia or of the Provisional Administration of the Territory of Papua-New Guinea? There is nothing in the evidence to suggest the latter conclusion, but whether or not the petrol was the property of the Commonwealth of Australia requires careful examination.

It is a matter of common knowledge that the area in which the drums were obtained was a battle field and that at the end of actual hostilities vast quantities of war material including petrol, oils and lubricants, were left in the area soon to be concealed by the fast-growing jungle and grass.

No direct evidence of ownership has been placed before the Court, but the Court is asked to infer from the fact that each accused was informed by Patrol Officer Tomasetti that he was investigating the disappearance of the drums of petrol, that neither claimed any property in the petrol acquired by orthodox means or they would then have asserted the claim and that, bearing in mind that the petrol was as the evidence shows brought to the area after the commencement of the war, that it is Commonwealth property.

The circumstances and time of the finding of the petrol in the grass satisfies me beyond a reasonable doubt that the petrol was war surplus not disposed of by the Commonwealth to either of the accused. I think that the Crown should have adduced evidence from some member of the Commonwealth Disposals Commission to establish that it was not sold to anyone at all, but as to this neither of the accused has suggested when interviewed as one would expect that they or either of them were or was collecting the petrol for some bona fide purchaser from the Commonwealth. I feel therefore that a jury would be justified in concluding that the petrol was the property of the Commonwealth and I so find.

It now remains to consider whether either accused or both accused stole the petrol.

Now stealing involves a number of elements which all must be proved beyond a reasonable doubt by the Crown. A person is said to steal who -

- (a) without the consent of the owner
- (b) fraudulently and without claim of right made in good faith
- (c) takes and carries away
- (d) anything capable of being stolen
- (e) with intent at the time of taking
- (f) permanently to deprive the owner thereof.

Sitting as a Judge and Jury I have no difficulty in directing myself that the drums of petrol are things capable of being stolen and it is clear that there was an asportation or "carrying away".

I find as a fact further that the evidence establishes beyond a reasonable doubt to my satisfaction that the petrol was taken without the consent of the owner and I am satisfied likewise that the intention was at the time of taking permanently to deprive the owner thereof, but the question of whether the taking was fraudulent requires most careful examination. Was the taking by either of the accused a taking "animus furandi". And in connection with a consideration of this aspect of the case it is necessary to remember that an honest though mistaken claim is enough to remove from the transaction the element of theft.

In effect the Crown contends that the intention of the accused must be inferred from the circumstances and that the circumstances were such that neither accused can be heard to say that they thought that the transaction was a legitimate one, but that they must be taken to be getting away dishonestly with the property.

I am not prepared to conclude from the evidence that either of the accused was aware of the contents of the Gazettes put in evidence by the learned Crown Prosecutor but it is stretching the credulity of the Court too far to believe that a man such as the accused Fraser believed that the native Ijimbari was empowered to sell the drums, but in regard to the accused Ijimbari on the other hand I do not feel satisfied beyond a reasonable doubt that he might not have thought that the accused Fraser was a person entitled properly to the ten drums and who was willing to pay him for its discovery. Fraser on the contrary was engaged in the business of disposals and I feel no doubt that he was well aware of the conditions upon which surplus war material could be acquired and that acquisition otherwise was quite wrong and fraudulent.

I can only come to the conclusion that Fraser stole the ten drums and accordingly I find him guilty; the accused Ijimbari must have the benefit of the doubt and I find him not guilty and he is discharged.

SENTENCE: To be imprisoned with hard labour for one year and six months.

E.B. BIGNOLD, J.