Whether the crime of stealing a straying cow requires an exact date of finding the animal and proof that finder had no knowledge the animal belonging to someone else

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Criminal Law - Theft of chattel
Criminal law elements of cattle theft.

re Brands Ordinance
Penal Code § 307 (Cattle Theft)
Court of Appeal Act § 22

IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

CRIMINAL APPEAL NO.14 OF 1981

Appellant appealed against his conviction for appropriating by cows, tampering with the existing brand, and by a new brand.

Between :

RAM PHAL s/o Pattan — Appellant

- and -

REGINAM — Respondent

G.P. Shankar for the Appellant
S. Chandra for the Respondent

Date of Hearing : 3rd November, 1981

Delivery of Judgment : 25 NOV 1981

JUDGMENT OF THE COURT

Henry J.A.,

Appellant was acquitted in the Magistrate's Court at Ba on a charge of Cattle Theft being an offence under Section 307 of the Penal Code. The prosecutor appealed to the Supreme Court. The acquittal was quashed and appellant was convicted and fined in the sum of $600. He has now appealed against conviction. The appeal is confined to questions of law : Section 22(1) of the Court of Appeal Act (Cap 12).

Appellant is bound in this Court by all findings of fact and inferences from found facts as determined in the Supreme Court. These findings are :

In November 1974 Ramanna f/n Sublu owned a heifer which he took to a neighbour, Saukuru, at Koroboya for agistment. The animal then had the brand 7KY on the left foreleg at the shoulder. This was a brand which Ramanna

used but it belonged to his uncle. The cow was found to be missing sometime between November 1974 and December 1975. In October or November 1978 one Hansraj saw a cow on appellant's land bearing the brand 7KY as described above. Hansraj pointed out to appellant that it was Ramanna's brand. Appellant claimed the cow as his property. About a week later Hansraj saw the same cow on appellant's property but the brand 7KY had been "burnt out" and there was a brand FTB on the left hind leg. Witness again saw the cow on appellant's place in August 1979. Adi Narayan, a brother-in-law of Ramanna, identified the cow as being a heifer formerly belonging to Ramanna.

At the request of the police Mukesh Chhotka Reddy, a livestock officer, examined the cow on April 18, 1979. He described both brands. Witness said that the shoulder brand had been tampered with and a brand in which only the letter B was decipherable had been superimposed. Witness said that the letter K was decipherable as part of the old brand. The letter K appears in Ramanna's brand but not in the brand of appellant. Witness said the brand FTB on the hind leg was a new one between 3 to 4 months old. According to Hansraj the brand was "burnt out" and a new brand was put on about a week after he first saw the cow on appellant's property. This time is reasonably close to the time fixed by Reddy.

Appellant, when interviewed by the police, claimed the cow was his and that it had been bred by him and branded FTB when small. The reason given for the indistinct brand on the shoulder was that she had moved and was re-branded on the hind leg. This claim was re-iterated in the formal charge and was later given in evidence. The learned magistrate found appellant was untruthful and that the animal was, in fact, the property of Ramanna and branded by him before it went missing in 1974 - a finding which was accepted by the learned judge.

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Appellant stated to P.C. Mahendra Prasad that after the cow had calved he brought it home for milking. This was in 1976. At night he tethered the cow at his home but kept it in a small paddock for grazing bringing it back each evening for milking. He so kept it for 1½ years.

The learned judge disagreed with the view taken in the Magistrate's Court and said :

> "In my respectful view what the learned magistrate should have considered was:- does the evidence show that whenever it was that the accused actually discovered the cow, that is found it, did he at that time decide not to inquire for the owner of the brand and to keep the cow for himself? If the answer is in the affirmative he should have convicted the accused."

After reviewing the evidence he came to the following conclusion :-

> "In my view the only reasonable conclusion one can come to is that when the accused first realised the cow was on his land he believed that the owner could be found by taking reasonable steps but decided dishonestly to appropriate it."

The first ground of appeal is :

> "1.(a) having regard to the findings of fact made by the learned trial Magistrate, and the decision of the Fiji Court of Appeal in Brij Basi Singh (17 Fiji Law Reports 65);
>
> (b) there was no evidence as to when the animal was found by the Appellant, and no evidence whether he reasonably believed at the time of finding that the owner could reasonably be found;
>
> (c) no evidence that the appellant at the time he found the cattle had any knowledge as to who was the owner of the cattle, nor any evidence that at the time of finding the appellant appropriated the cattle or did any thing to deprive the owner permanently, and therefore the necessary elements of theft were missing;

(d) the learned Judge of Appeal ought to have held that subsequent act of appropriation or exercise of dominion over the cattle, was not sufficient to constitute cattle theft in respect of found animal."

The second ground of appeal relates to the Brands Act (Cap 140). It need not be set out in detail.

The charge was made and determined under the 1967 Edition of the Laws of Fiji so that legislation will be referred to. The statement of offence made a charge of Cattle Theft contrary to Section 307 of the Penal Code (Cap 11) which reads :-

"Any person who steals any horse, cattle or sheep is guilty of a felony, and is liable to imprisonment for fourteen years."

Theft is defined in Section 291 which provides :-

"291.(1) 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 :

(Then follows a proviso which does not apply.)

(2) (a) The expression "takes" includes obtaining the possession -

(iv) by finding, where at the time of the finding the finder believes that the owner can be discovered by taking reasonable steps."

It is clear that at some time within the stated dates appellant took possession of the animal: that he had no consent of the owner and no claim of right made in good faith. The only claim he has ever made is that he bred and reared it - a claim which was found to be false. There is ample evidence that he intended permanently to deprive the owner of his right to the cow. This was not in issue on the present appeal. What is in issue is whether at the time when he found the cow he believed that the owner could be discovered by taking reasonable steps. It is common ground he took no steps.

The exact time of finding is not known but it is clear that when the cow calved appellant took complete dominion over it in circumstances in which the brand would be quite clearly visible to him. He milked it and kept it at his home. However, the exact time is not a necessary ingredient of the offence so long as it is clear that such a time must have occurred. The time, when the necessary intent to steal must be shown, is when appellant discovered that he had a cow with someone else's brand (which obviously had strayed onto his land) and knew it did not belong to him and decided to appropriate it.

The various authorities are reviewed in Russell v Smith (1958) 1 QB 27. It is not necessary to cite from the various cases reviewed in Russell v Smith in which their effect is summarised in the headnote which we have earlier adapted to the facts of the present case. Appellant alone knows when this time was but there is more than ample evidence to hold that such an event did occur at least after the cow calved when he took it home and milked it as his house cow.

There is the clearest evidence from which the learned judge could conclude that appellant discovered on his property a cow with someone else's brand and that it was not a cow which he had acquired but that it belonged to someone else and that he decided to appropriate as his own and did in fact so appropriate it. The time is known to appellant and probably no-one else but that it did happen is a proper inference from the facts.

The remaining question on this topic is whether he believed that the owner could be found by taking reasonable steps. The practice of branding cattle for identification is too well-known for further comment. But appellant is a farmer who brands his own cattle and agists cattle (no doubt mostly branded for identification) belonging to others. His act in obliterating one brand and substituting another speaks volumes, particularly since it was done after he was told it was Ramanna's brand. Ramanna knew appellant.

Ramanna had been to appellant's paddock to leave a bull after the cow was missing. Ramanna said appellant's paddock was adjoining Saukuru's property and Saukuru said their properties were near each other. Saukuru had slept at appellant's place. In 1976, Saukuru gave appellant a list of missing animals (but not including this cow). Some of the animals were recovered from appellant's property.

Saukuru said, as was plain from the evidence, that it was possible for animals to escape from his paddock to the property of appellant. Appellant admitted that Saukuru did complain about animals missing from his property. It is idle to suggest that appellant did not know that the owner could be found by making reasonable inquiries in the near neighbourhood and the obvious and first inquiry would be of Saukuru where the cow was agisted. The mere fact that he refrained from making that obvious enquiry is eloquent.

The reference to the Brands Act appears in the following passage in the judgment :

> "The Brands Ordinance, Cap. 140, creates a register of brands containing the names and addresses of the proprietors of cattle brands. By section 17 the brand on a beast is prima facie evidence of ownership. The accused according to his evidence owns thirty-five head of cattle and agists over three hundred head belonging to others upon his land. He must know that the cow's owner could be traced from the register by its brand. <u>But it would scarcely be necessary to go to that trouble as simple inquiries in the area would no doubt quickly reveal the owner of the brand '7KY'</u>.
>
> Although Ramanna says that '7KY' was his uncle's brand there was nothing to prevent the accused from taking steps to find the owner and there can be little doubt that he would have found him."

The underlining is ours. The learned judge did not rely any further on the Act but decided the case on the factual evidence as we have already outlined it. This ground fails.

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Counsel for appellant placed considerable reliance upon the decision of this Court in Brij Basi Singh v Reginam 17 FLR 65. Its facts have some superficial resemblance but the Court held that from those facts no reasonable inference of guilt could be drawn. Attention was then drawn to a number of possibilities open on the evidence which the trial court might have come to a conclusion of guilt, but, possibly because of a mistaken view of the law, these possibilities were not considered. In the present case the learned judge has not mistaken the law and has correctly considered the elements of the offence charged in relation to the facts proven.

Counsel for appellant also relied on Thomas 37 C.A.R. 169. The judgment began by stating :

> "The Court feels obliged to quash this conviction not, I hasten to say, by reason of any merits on the part of the appellant who, as the jury evidently thought, was acting dishonestly throughout, but because the case was not really presented in the way it ought to or might have been presented with regard to the doctrine of stealing by finding."

It later concludes by observing that a vital factor was not put to the jury and was never properly explored. That does not apply to the present case in which the learned judge approached his task correctly.

In our view the learned judge came to a correct conclusion and there is ample evidence in support.

The notice of appeal purported to include, an appeal against sentence but it was abandoned.

The appeal is dismissed.

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VICE PRESIDENT

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JUDGE OF APPEAL

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JUDGE OF APPEAL