

RAM SINGH

v.

REGINAM

[SUPREME COURT, 1963 (MacDuff C.J.), 1st, 22nd March]

Appellate Jurisdiction

Criminal law—defence—negative averment—onus on accused—Penal Code (Cap. 8) s. 124—Criminal Procedure Code (Cap. 9) s. 205.

Criminal law—theft—*animus furandi*—taking with purpose of extracting ransom—Penal Code s. 285 (1)—Larceny Act, 1916 (Imperial) s. 34—Cap. 55, 9 Geo. IV, s. 51 (Ireland).

The appellant was convicted of corruptly taking money under pretence of helping the owner to recover a stolen pair of bullocks contrary to s. 124 of the Penal Code. It was submitted on appeal (*inter alia*) that there was no evidence that the appellant had not used "all due diligence to cause the offender to be brought to trial" (as provided in s. 124) and also that the theft of the bullocks had not been strictly proved.

Held.—(1) That the words in s. 124 referred to above constitute a negative averment and s. 205 of the Criminal Procedure Code throws the onus of establishing that defence upon the accused.

(2) That if the bullocks were taken with the purpose of extracting ransom for their return this constituted *animus furandi* for the purpose of the crime of theft. *R. v. O'Donnell* (1857) 7 Cox C.C. 337, followed.

Appeal against conviction.

Pillai for the appellant.

Palmer for the Crown.

MACDUFF C.J., [23rd March, 1963]—

The appellant was charged with the following offence:—

“ Statement of Offence

Corruptly taking money: Contrary to section 124 of the Penal Code, Cap. 8.

Particulars of Offence

Ram Singh, s/o Sukh Lal on the 23rd day of October, 1962, at Votualevu, Nadi, in the Western Division, corruptly took £20 in money from Ram Sewak, s/o Ram Autar under pretence of helping the said Ram Sewak, s/o Ram Autar to recover 1 pair of bullocks which had been stolen from the said Ram Sewak, s/o Ram Autar.”

He was convicted and sentenced to serve a term of 12 months' imprisonment against which conviction and sentence he now appeals.

Section 124 of the Penal Code under which the charge is laid reads—

“ 124. Any person who corruptly takes any money or reward, directly or indirectly, under pretence or upon account of helping any person to recover any property which has, under circumstances which amount to felony or misdemeanour, been stolen or obtained in any way whatsoever, or received, is (unless he has used all due diligence to cause the offender to be brought to trial for the same) guilty of felony, and is liable to imprisonment for seven years.”

It is immediately obvious that to sustain a conviction for an offence against this section a number of facts require to be proved. Taking them in chronological order the first is that certain property has been stolen, or obtained in any way whatsoever, or received; the next is that the circumstances under which the property was stolen, obtained or received must amount to a felony or misdemeanour. Then the accused must be proved to have taken money or reward from some person on the pretence or for the purpose of helping in obtaining the return of that property. The receipt or obtaining of such money or reward must be proved to have been corrupt, for example that the accused never intended to carry out his promise. The accused is given one defence in the section, that he used all due diligence to cause the thief, obtainer, or receiver to be brought to trial. This, of course, negatives the corrupt element of the receipt by an accused of the money or reward. Since it is a negative averment section 205 of the Criminal Procedure Code throws the onus of establishing that defence upon an accused. It is in the light of those requirements that the grounds of appeal are to be considered.

The first ground is the general ground that the decision of the learned trial Magistrate is unreasonable and cannot be supported having regard to the evidence. The remaining grounds are really in amplification of that general ground of appeal. The second ground of appeal is stated as follows:—

“ That there was no evidence that your petitioner did not use all the diligence to cause the offender, if any, to be brought to trial for the larceny of the bullocks.”

Bearing in mind that the onus was on the appellant to establish this defence he precluded himself from so doing by his denial of receipt of the money, the alleged object of the payment or that he had any knowledge of the thieves. Accordingly this particular defence was not even referred to by counsel in the Court below nor was it considered by the learned trial Magistrate. I see no merit in this ground.

The third ground of appeal is—

“ That the missing of the bullocks and their return under the circumstances related by the first witness for the prosecution, Ram Sewak, does not amount to a theft which must be strictly proved in accordance with section 285 of the Penal Code (Cap. 8).”

The charge against the appellant alleged in its particulars “ one pair of bullocks which had been stolen from the said Ram Sewak, s/o Ram Autar ”. The learned trial Magistrate accepted the proposition that the offence charged could not be established unless the prosecution proved beyond a reasonable doubt that the bullocks had in fact been stolen.

I am in complete agreement, as is counsel for the Crown, that that proposition is correct in law. Counsel for the appellant accordingly rests his appeal on this ground on the definition of “ theft ” in section 285 (1) of the Penal Code—

“ 285.—(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:

Provided that a person may be guilty of stealing any such thing notwithstanding that he has lawful possession thereof, if, being a bailee or part owner thereof, he fraudulently converts the same to his own use or the use of any person other than the owner.”

Following this definition the prosecution must prove what is known as the *animus furandi*—"the intention at the time of such taking permanently to deprive the owner thereof". Since the actual persons who removed the cattle from the property and possession of Ram Sewak have not been prosecuted to conviction, and are to all intents and purposes unknown, the proof that the pair of bullocks in question were actually stolen is dependent on circumstantial evidence. Counsel concedes that there is evidence that the two animals were tethered in Ram Sewak's compound on the evening of 20th October, 1962, that they were missing the following morning, and that when the bullocks returned, or were returned, and were found in Ram Sewak's compound on the morning of the following Thursday the tethering ropes were missing. He contends, however, that such evidence alone is insufficient on which the learned Magistrate could find that the two bullocks had been stolen on the night of 20/21st October, 1962, and he advances a number of alternative hypotheses which he contends are reasonable and which explain such facts as have been proved. Amongst these he put forward the hypothesis that the bullocks had originally strayed, that they had been removed by vandals, that the thieves stole the tethering ropes only and not the bullocks, or that the bullocks were taken for the purposes of extracting ransom for their return.

The learned trial Magistrate dealt with this proposition in his judgment as follows:—

"There is no doubt from the evidence of the ropes that they must have been removed by human agency. Mr. Pillai says that this does not exclude every possibility except theft.

A number of technical reasons might preclude the taking away from being a theft but when Court looks at all the facts, there is no other reasonable explanation here except theft. Someone must have untied the ropes. Accused told Ram Sewak he knew the thieves. Within two days of the payment the bullocks return."

I would agree that his findings of fact exclude the first three hypotheses advanced by counsel. I am, however, more than doubtful whether those facts together with a statement by the appellant that he knew the "thieves" must necessarily exclude counsel's final hypothesis. I therefore propose to examine the problem whether, even if the two bullocks had been taken for the purpose of extracting ransom for their return, this would amount to theft.

Section 124 of the Penal Code is identical with section 34 of the Larceny Act, 1916. This section has, in the same form, existed in English criminal law since it was first enacted in the reign of George I. Considering the complexity of the section and the centuries it has been law it is rather remarkable to find that it has been the subject of interpretation in two reported cases only, and neither of those cases were concerned with the proof of the property having been stolen.

I have, however, been able to find a decision of the Court of Criminal Appeal in Ireland which deals with an offence against the provisions of section 51, Cap. 55, 9 Geo. IV, the wording of which is identical with that of section 124 of the Penal Code. *R. v. O'Donnell* (1857) 7 Cox's Criminal Law Cases, 337 was a case stated by Monahan, C.J., for decision of the Court of Criminal Appeal in Ireland. The second question he posed was this—

"Secondly, was I, under the circumstances stated in this case, correct in informing the jury that a taking away of the prosecutor's mare, with the intent and for the purpose of obliging him to pay a sum of money for her restoration, was a felonious stealing within the act?"

That direction was approved, although no reasons were given. It would appear from the argument that the Court probably accepted the argument put forward by counsel for the Crown which is reported—

“As to the larceny point, it is not necessary that there should be, on the part of the taker, an intention of appropriating, such as is contended for by Mr. Dowse. An intention of getting money by a disposal in any way of the stolen property is sufficient: *Reg. v. Manning and Smith* (1 Dearsley C.C. 21), establishes this proposition. There a person in the prosecutor's employment carrying out an arrangement to cheat his master, took a number of bags out of a warehouse and left them in a place where bags were usually delivered, with the intention of assisting another to get payment for the sacks. The jury found that the bags had been removed in pursuance of a previous arrangement, and it was held that the prisoner was rightly convicted of larceny. So in *Reg. v. Hall* (1 Den. C.C. 381), it was held that if *A.* takes the goods of *B.* wrongfully, and offers them for sale to *B.* as the goods of another, he is guilty of larceny.”

In my view there is a simple and logical reason why a taking of goods with the object of ransom should be held to have been done *animus furandi*. What is the intention at the time of the taking? It appears to me quite clear that the intention is permanently to deprive the owner of the property in the goods taken unless he is willing to pay for their return. That, in my view, constitutes theft. For those reasons I dismiss this ground of appeal.

The appellant has appealed in general terms against conviction. The two matters to which he referred were both considered by the learned trial Magistrate. Despite them he accepted the evidence of the two main prosecution witnesses, I think, quite correctly. I see no reason why I should disturb his findings. Appeal against conviction is, therefore, dismissed.

Appellant also appeals against sentence as being manifestly excessive. The appellant has no previous convictions. On the other hand the serious nature of this offence is demonstrated by the maximum penalty attached to its commission. The offence itself, perpetrated in respect of a farming peasant's working cattle is a particularly mean type of offence. In all the circumstances I think the sentence was thoroughly justified.

Appeal against sentence is also dismissed.

Appeal dismissed.

Solicitors for the appellant: *M. V. Pillai and Co.*

Solicitor-General for the Crown.