RAMEN PRASAD

v.

THE STATE

[COURT OF APPEAL—Tuivaga, P., Kermode, J.A., Tikaram, J.A.]

Criminal Jurisdiction

Hearing: 1 May, 1988
Judgment: 24 June, 1988

(Criminal Law—Offence of corruptly taking—form of charge—essential elements to be stated—need not negative an exception etc. in respect of which onus on accused, as here.)

Appellant In Person
I. Mataitoga—for the Respondent

Appeal by Ramen Prasad against his conviction and sentence on 3 counts of corruptly taking a reward contrary to s.135 of the Penal Code (Cap. 17).

S.135 of the Penal Code read—

"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."

A specimen of the charges preferred against the appellant read:

"Ramend Prasad (s/o Hari Prasad) and Nirbhay Singh (s/o Latchmi Narayan Singh), on the 6th day of January, 1986 at Togo Masi, Nadi in the Western Division, corruptly took the sum of $180 in money from Ram Sarup (s/o Banwari) for the return of his stolen pair of bullocks."

The Court considered first the form of the charge, in that it omitted reference to the exception bracketed in s. 135. It referred to an earlier decision (Dyke, J., *R. v. Ajay Chand)* which was called into question. The Court referred to s. 122 *(b)* (ii) and s. 144 of the Criminal Procedure Code set out hereafter—

"It shall not be necessary, in any count charging an offence constituted by an enactment, to negative any exception or exemption from, or priviso or qualification to, the operation of the enactment creating the offence:"

A The Court also referred to *R. v. Edwards* (1974) Cr. App. R. 213 quoting therefrom the following—

> "If the true construction of the enactment is that it prohibits the doing of acts subject to provisos, exceptions and the like, the prosecution can rely on the exception and are not required to prove a prima facie case of lack of excuse qualification or the like. In such case the persuasive, and not merely the evidential, burden of proof is placed on the defendant."

B

Reference was also made to the Criminal Procedure Code s.119 which provided that charges should contain and would be sufficient if it contained—

> ".... a statement of the specific offence or offences with which the accused person is charged....."

C

The section went onto refer to particulars. The essential ingredients of the instant charges were—

(a) there was a corrupt taking of reward:
(b) for the purpose of recovering property: and
(c) known to the accused to have been stolen.

D

The court proceeded to examine the grounds of appeal as to conviction, though without the assistance of Counsel, the appellant appearing in person. The grounds, said the Court, amounted to a protestation of innocence, the appellant being a mere messenger. The learned Judges, referred to the summing up and quoted an admission by the appellant.

E *Held:* The elements in this offence which the prosecution had to prove to discharge its legal burden are as stated above.

(1) A charge need not aver the exception to liability which would have afforded a defence.

F (2) The words unless etc. in s. 135 provide an exception from liability for an accused person.

(3) The evidential burden of disproving a negative averment rested, as a matter of law, on the accused person and not the prosecution.

As to the substance of the appeal, there was ample evidence that the appellant G knew the cattle had been stolen. Receipt of money had not been denied in each case having regard to the whole of the summing up and in particular to passages quoted, the learned trial Judge had correctly directed the assessors.

The appellant was a key figure in a widespread racket which had become a matter of great concern. The sentence was less than severe.

H

Appeal against conviction and sentence dismissed.

Cases Referred to:

R. v. Edwards (1974) 59 Cr. App. R. 213.
R. v. Pascoe (1849) 1 Den 45.6.
R. v. Worthington (1921) V.L.R. 660

Judgment of the Court

This judgment only conerns Ramen Prasad the first named appellant who was accused No. 1 in the then Lautoka Supreme Court Criminal Case No. 4 of 1987 since Nirbhay Singh the second named appellant (accused No. 2 in the same case) has wholly abandoned his appeal—No. 44 of 1987. Nirbhay Singh has in fact already served his sentence and his appeal has been formally dismissed.

The first appellant was convicted by Dyke J. on three counts (2, 3 and 4) of Corruptly Taking Reward contrary to Section 135 of the Penal Code, Cap. 17. Appellant was sentenced to one year imprisonment on each count to run consecutively i.e. a total sentence of three years.

Section 135 of the Penal Code reads as follows:

> "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."

The words "unless he has used all due diligence to cause the offender to be brought to trial" in Section 135 provide an exception from liability for an accused person charged with offence under the Section. No reference was made in the particulars of offence to the exception to liability. The point of interest was whether the omission rendered the charge defective.

Thus for instance in Count 2 the particulars read as follows:—

> "Ramend Prasad (s/o Hari Prasad) and Nirbhay Singh (s/o Latchmi Narayan Singh), on the 6th day of January, 1986 at Togo Masi, Nadi in the Western Division, corruptly took the sum of $180 in money from Ram Sarup s/o Banwari for the return of his stolen pair of bullocks."

Although the issue was not raised in the notice of appeal by counsel for appellant, Mr S. R. Shankar, the question that the charge may have been defective was discussed during the hearing of the appeal. It was discussed because in an earlier ruling given by Dyke, J. on a similar charge, namely in the case of *R. v. Ajay Chand* Criminal Case No. 24 of 1986, he acquitted the accused after the prosecution evidence closed because there he took the view that the charge failed to aver the fact that the accused did not use all due diligence to cause the offender to be brought to trial.

As the issue was of sufficient importance we adjourned the appeal to enable Mr Mataitoga, the Acting Director of Public Prosecutions to make submissions as to the status of the charge in the present case.

A We are grateful to Mr Mataitoga for his assistance at the adjourned hearing of the appeal.

Mr Mataitoga submitted that the earlier ruling of Dyke, J. was erroneous in law in requiring reference to be made in the charge to the exception which was essentially one of a negative averment. We were referred to a number of authorities in support of his contention.

B The appellant was not represented in this Court due to the absence from the country of Mr S. R. Shankar. In any event Mr Shankar did not raise this point during the trial of the case.

It seems to us that the situation is to a large extent covered by section 122*(b)* (ii) of the Criminal Procedure Code which provides as follows:

> C "it shall not be necessary, in any count charging an offence constituted by an enactment, to negative any exception or exemption from, or proviso or qualification to, the operation of the enactment creating the offence."

Section 122 deals with rules for framing charges. Thus on a proper reading of the above quotation it is not essential for the charge to aver the exception to liability which have afforded a defence to the accused person. This follows from the fact that the evidential burden of disproving a negative averment rests as a matter of law on D the accused person and not the prosecution. This is provided for under Section 144 of the Criminal Procedure Code which reads:

> "Any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the Act creating such offence, and whether or not specified or negatived in the charge or E complaint, may be proved by the defendant or accused, but no proof in relation thereto shall be required on the part of the complainant or prosecution."

The argument that the prosecution is not concerned with disproving a negative averment but only with proving the act prohibited by statute and alleged in the charge has been further reinforced by the leading case of *R. v. Edwards* (1974) 59 Cr. App. R. 213.

F The following passage in the headnote is opposite:—

> "If the true construction of the enactment is that it prohibits the doing of acts subject to provisos, exceptions and the like, the prosecution can rely on the exception and are not required to prove a prima facie case of lack of excuse qualification or the like. In such cases the persuasive, and not merely the evidential, burden of proof is placed on the defendant."

G In every charge preferred against an accused person the offence must be specified with necessary particulars in accordance with section 119 of the Criminal Procedure Code which states:—

> "Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reason- H able information as to the nature of the offence charged."

Thus in our view it would suffice to comply with section 119 of Criminal Procedure Code if the essential ingredients of the offence under section 135 of the Penal

Code are shown to be specifically included in the particulars of offence: the particulars must allege:— A

(a) there was a corrupt taking of reward:
(b) for the purpose of recovering property: and
(c) known to the accused to have been stolen.

The above ingredients of the offence comprise the prohibited act under the section which the prosecution had to prove to discharge the legal burden of proof required for a conviction unless, of course, an accused person can bring himself with the exception of liability under the section. B

The terms of Section 135 of our Penal Code are identical to Section 34 of the English Larceny Act 1916 which has since been repealed by the Theft Act of 1968. It is interesting to note that the 36th Edition of Archbold in paragraph 3469 provides the following specimen for particulars of offence for corruptly taking reward contrary to Section 34 of the Larceny Act of 1916:— C

"A.B. on the _____ day of _____ of_____ in the vicinity of _____. corruptly took the sum of $10 from J. N. under the pretence of helping him to recover his _____ had been stolen."

D

It is to be observed that no reference is made in the charge to the exception to liability under section 34. For the reasons given we are satisfied that the charge in this case was in terms properly laid.

We now turn to the grounds of appeal against conviction. These are as follows:—

"1. THAT the Learned Trial Judge erred both in law and in fact in convicting the Appellant for the alleged offences when there was no evidence of corrupt taking. E

2. THE Learned Trial Judge failed to direct the Gentleman Assessors and himself that the Appellant's intentions were to assist the Complainants in the respective counts to recover their cattle as opposed to any element of dishonest intentions.

3. THAT the Learned Trial Judge misdirected himself and the Gentlemen Assessors as to the meaning of the theft of the cattle. F

4. THAT the evidence quite clearly showed that the Appellant in each case, was apparently acting as a trustee of the complainants in respect of the monies given to him and which money the appellant, at the request and direction of the Complainants, paid to the named Fijians in order to recover the cattle.

5. THAT the total sentence of three years of imprisonment, in view of the total recovery of the cattles, in view of there being no gain to the appellant and having regards to all the circumstances of the case it is manifestly harsh and excessive." G

At the hearing of the appeal the appellant was not represented. His Counsel we believe is no longer in the country. The only submission that the appellant made was in the form of a plea that the balance of his sentence of seven months be remitted. However as we could not fairly expect a layman of rustic background to H

elaborate on legal issues even if he wished to pursue his appeal against conviction
A we felt we should nevertheless deal with the grounds of appeal as filed. Gounds 1, 2 and 4 can be grouped together as they really constitute a protestation of innocence in that the evidence on each count pointed to the appellant being a mere messenger or an innocent trustee of the complainant.

In respect of each count on which he was convicted there was ample evidence that the appellant knew that the cattle in question had been stolen. Furthermore
B receipt of money has not been denied in each case. And we refer to the following passages from the learned judge's summing-up at pages 45 and 46 on the question of corrupt taking:

> **"In one case (*R. v. Pascoe* (1849) 1 Den 456) it was held that there was a corrupt taking on the following facts being found by the jury—(a) the accused received money from the owner; (b) that he knew the thieves; (c) that he assisted in trying**
> C **to purchase the stolen goods from the thieves on behalf of the owner, not meaning to bring them to justice.**
>
> **And in another case (*R. v. Worthington* (1921) VLR 660) it was held that if the object or one of the objects of the accused was to afford facilities to offenders for the disposal of the stolen property whilst screening them from prosecution; and so enabling them to obtain the profit form their crime in safety he has acted**
> D **corruptly within the meaning of the section.**
>
> So you see that it does not avail an accused person to say that he was just helping the owner to recover his stolen property even at the owner's request, if he knew he was dealing with the thieves or even on behalf of the thieves, and that what he was doing was also affording facilities to the thieves to dispose of the stolen property, and obtain profit from their crimes whilst at the same time screening
> E them from prosecution, or assisting them to evade prosecution. In fact without using all diligence to try to ensure that they were prosecuted.
>
> I should also advise you that if the money was taken by the accused or either of them merely as a messenger, and by that I mean is say where A says to B "Take that money and give it to C" that would not be a corrupt taking, but was that the case in any of the counts we have here, or was not the accused's role in each case
> F much more that that of a mere messenger? That will be for you to decide."

Having regard to the whole summing-up and in particular to the passages quoted above we are satisfied that the learned trial judge correctly directed the assessors on what constitutes "corrupt taking" and what not, and left the question of fact to be decided by them. The fact that the 3 assessors unanimously expressed the opinion that the appellant was guilty on each of the 3 counts in question clearly
G indicates that they did not believe the appellant as to his being a mere messenger or an innocent trustee. We therefore have no hestitation in dismissing grounds 1, 2 and 4 as having no substances.

As regards ground 3 we do not think that it was incumbent on the trial judge to spell out in detail the ingredients of the offence of theft. It would have been otherwise had appellant been charged with theft. It would be stretching credulity a bit too far to suggest that the lay assessors had no ideas as to what constitute theft or stealing.

H The appellant himself in his unsworn statement at page 37 of the record says:—

"Vinod came to me in the morning in respect of Ram Swarup's bullocks and told me that his bullocks had been stolen." A

Nevertheless we would point to the following passage from the trial judge's summing-up at page 45 where he in fact very helpfully dealt with the basic elements of theft:—

"Now to deal with the offences themselves: on each count you must be satisfied that the animal or animals was or were stolen in the first place. In respect of each B count you have heard that the animals were tethered or left grazing, and were later found to be missing and searches failed to find them. In each case you have heard that contact was made with someone who had the animals and after the payment of money the animals were returned. Can you have any doubt that the animals were in fact stolen and the owner would have been permanently deprived of them if they had not managed to make contact and buy them back? Even if the animals had been taken with the intention of selling them back to the C owners if the owners were willing to pay enough for them that still amounts to the offence of stealing."

We find that ground 3 also has no merit. In the outcome therefore the appeal against conviction is dismissed.

As regards appeal against sentence the appellant should consider himself fortunate that the sentence on each count was not more severe. He was involved as a key D figure in a widespread racket which had become a matter of great concern not only to the farming public but also to courts and the police. This appellant's own record is such that he cannot lay claim to any further leniency.

His appeal against sentence is also therefore dismissed.

Appeal dismissed. E