

Appellate Jurisdiction

Labasa Criminal Appeal No. 23 of 1978

Between:

THE DIRECTOR OF PUBLIC PROSECUTIONS

and

RAM PRATAP s/o GANGA PRASAD

JUDGMENT

On the 23rd January 1978 at Labasa Magistrates Court the respondent was charged with larceny of a heifer contrary to section 307 of the Penal Code, to which he pleaded not guilty, and the case was ultimately heard on the 18th July 1978.

After the prosecution had called their three main witnesses they applied, under the provisions of section 204 of the Criminal Procedure Code, to add an alternative charge of fraudulent conversion contrary to section 311(c)(i) of the Penal Code and the trial Magistrate, with some reluctance, allowed this charge to be added, commenting that the charge of larceny could not be supported by the evidence. The respondent thereupon pleaded guilty to the alternative charge and the trial Magistrate, after hearing from the respondent in mitigation, made an order under section 38(1) of the Penal Code discharging the respondent on condition that he commit no offence for a period of twelve months.

The Crown has appealed against this order as being manifestly inadequate.

The prosecution evidence was most confused and contradictory and, had the trial proceeded, I would not have thought it sufficient to put the respondent on his defence for having committed any criminal offence. However, when charged with fraudulent conversion, the respondent admitted that he was given possession of a heifer belonging to the complainant on certain conditions, one being that if it did not calve after a year he was to return it to the complainant in exchange for another. The heifer did not calve but, instead of returning it, the respondent sold it for forty two dollars and retained the proceeds.

On these facts there was no need for an alternative charge of fraudulent conversion to be preferred against the respondent. Both the prosecution and the trial Magistrate appear to have overlooked the proviso to section 291(1) of the Penal Code which is in the following terms:

"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."

The transaction between the complainant and the respondent created a bailment, and the unauthorised sale of the heifer

was an act which was inconsistent with the bailment and constituted a fraudulent conversion by the respondent (Rogers v. Arnott (1960) 2 All E.R. 417) in respect of which the respondent could properly have been found guilty of larceny by bailee of a heifer contrary to section 307 of the Penal Code, as originally charged.

Nevertheless, fraudulent conversion contrary to section 311 of the Penal Code may be committed on the same facts as would support a charge of larceny by bailee; and as that is so in this case the finding of guilt in respect of the alternative offence of fraudulent conversion can stand.

Turning to sentence, a relevant factor is that had it not been for the honest admissions by the respondent it is extremely doubtful whether a criminal offence could have been established. Further, the respondent submitted that the heifer was half-wild, ate clothes off the clothesline and damaged his belongings, which led him to sell it. This was confirmed by the purchaser, who in evidence stated that he sold it again only ten or twelve days later as it was a wild natured animal.

Counsel for the Crown has quite properly drawn the Court's attention to three previous cases in which it was held that to order a discharge under the provisions of section 38(1) of the Penal Code was inappropriate, namely

the Attorney-General v. Dukhu (4 F.L.R. 100), R. v. Paras Ram (Lautoka Cr.App.No. 21/77) and R. v. Edmond March and Ors. (Suva Cr.App.No. 33/77). However, the case of the Attorney-General v. Dukhu is no longer an authority, as section 38(1) of the Penal Code has since been substantially amended; and the facts and circumstances of the remaining cases cited are clearly distinguishable.

I do not consider a conditional discharge in the circumstances of this case to be manifestly inadequate, but the respondent should not be permitted to benefit financially from the wrongful sale of the heifer and the trial Magistrate should, in my view, have ordered compensation as one of the conditions, which he was entitled to do by virtue of section 4 of the Penal Code (Amendment) Act 1973.

I accordingly order, as an additional condition attached to the respondent's discharge, that he pay to the complainant the sum of forty two dollars through Labasa Magistrates Court by the 31st October 1978.

(Sgd.) Clifford H. Grant  
Chief Justice

Suva,

15th September 1978.