

Appellate Jurisdiction

Criminal Appeal No. 84 of 1979

BETWEEN : R. E G I N A M Appellant

A N D : TOMASI SOVILEA Respondent

D. Williams for the Appellant

A. Kuver for the Respondent

JUDGEMENT

This is the D.P.P.'s appeal against an Order of a magistrate granting an unconditional discharge to a man who admitted killing a cow worth \$200.00 C/359 P.C.

The accused is a cane farmer and the complainant is a cattle farmer whose cattle have repeatedly strayed on to the accused's farm damaging his cane and crops. In order to protect his farm the accused had even repaired the complainant's fencing in order to keep the complainant's cattle on their owner's land. On the occasion in question there were 19 cattle on the accused's farm and he deliberately killed one of them.

The learned magistrate stated that in the Sigatoka area the commonest offence is the failure of cattle men to fence in their cattle. He pointed out that straying cattle cause thousands of dollars worth of damage to agricultural farms. In accepting that there was no other way in which the accused could save his farm the magistrate discharged him unconditionally.

Mr D. Williams for the D.P.P. stated that stealing and killing of cattle is a prevalent offence

in the Western Division.

Mr Kuver, for the accused (respondent) pointed out that the maximum penalty for allowing cattle to stray is \$20.00. He argued that cattle farmers found it profitable to let their cattle feed on their neighbours farms and to pay the paltry fine on such occasions as their guilt could be proved. On the other hand he contended that the cane farmer had little remedy at law in that in any action for damages it was so difficult to meticulously prove the extent and amount of damage caused by one straying animal that it was almost futile to bring any action.

The D.P.P. expressed fears that the learned magistrate's attitude in this case could encourage cane farmers to slay straying cattle and this may lead to serious trouble. I note that offence occurred in August, 1979 and there appear to be no incidents he could point to in support of those apprehensions.

It seems that the learned magistrate regarded the accused as a person driven to the point of desperation by repeated trespass and damage to his cane farm in circumstances where the existing law appeared to offer little protection. On the face of it his approach to the question of punishment in ordering an unconditional discharge under Section 38 Penal Code : is not very surprising. However, I do not think that his approach suggests that he intends to treat all agricultural farmers with the same degree of leniency, or that he is expressing approval of a man who takes the law into his own hands.

The accused is a man of good character and hitherto he has no previous convictions. He is entitled to have the benefit of his good character weighed in his favour when sentence is considered along with the circumstances of extreme provocation. The circumstances were not made an excuse to steal the carcass which the complainant had the benefit of.

It seems to me that the magistrate want too far in making the discharge unconditional. There should be an attempt to ensure that the accused or his neighbours do not presume to take the view that similar acts of retaliation will be dealt with as leniently as this.

The learned magistrate's order is amended by recording a conviction and making the discharge conditional on the accused being of good behaviour and committing no offence during a period of 12 months from the date of the magistrate's original order i.e. 19/9/79. To that extent the D.P.P.'s appeal is allowed.

I would add that the accused and other agricultural farmers in similar situations may not be limited to a remedy by way of a simple action for damages. There are other ways of restraining persons who frequently trespass on one's property and cause damage. This should be carefully borne in mind by anyone else who contemplates emulating the accused.

The accused's behaviour put the prosecuti on to some trouble in the Court below and in the present case. I order that he pay \$10.00 for costs in the Court below and \$20.00 the costs of this appeal.

LANTOKA

1st February, 1980

(J. T. WILLIAMS)

JUDGE