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IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 62 of 1979

Between: ALFRED EDWARD Appellant

and

REGINAM Respondent

A.B. Ali for the Appellant  
M. Raza for the Respondent

Date of Hearing: 9 June 1980

Date of Judgment: 27th June 1980

JUDGMENT

Marsack, J.A.

This is an appeal against a judgment of the Supreme Court sitting on appeal from the Magistrates' Court, and accordingly is confined to questions of law under section 22(1) of the Court of Appeal Ordinance.

Appellant was convicted in the Magistrates' Court under section 3 of the Trespass of Animals Ordinance, Cap.143, of failing to confine animals by a fence, and was fined \$20, in default one month's imprisonment. He appealed against his conviction to the Supreme Court, and in a written judgment dated the 7th December, 1979 the appeal was dismissed. Against that judgment he has

appealed to this Court.

The essential facts are not in dispute. The herd of fifteen cattle concerned in the charge are the property of a company in the United States of America, but are being cared for by the appellant on a section of land adjoining his own farm. The learned Judge found that the arrangement with the American company was that

"the appellant looks after the cattle, keeps the fences in good repair, employs a servant to attend to the animals and, when they are ready sell them on behalf of the company. He accounts to the company for the proceeds of sale and claims expenditure incurred in looking after the cattle."

On the 6th January, 1979 the fifteen cattle were found to have strayed from their own field into the bean plantation of a Fijian farmer, and were causing damage to the crop of beans. It was accordingly clear that the animals had not been kept confined "within corral, fold, pen, stable or building" as required under section 3(1) of the Trespass of Animals Ordinance.

Under that Ordinance the person responsible for failing to keep the animals properly confined is the "owner". The only point requiring determination in the present appeal is whether the appellant, in the circumstances of the case outlined above, could correctly be described as the owner of the cattle concerned.

The learned Magistrate held that as the appellant was the agent of the American company here in Fiji and was authorised to look after the

cattle and sell them in due course, he could properly be held to be the owner within the meaning of the Ordinance. The learned Supreme Court Judge quoted the relevant legislation in England and some cases decided on that legislation. He then proceeded to say:

"It would, in my view, be defeating the whole purpose of that Ordinance if a person who has complete de facto control of cattle and who exercises all the rights of ownership, including that of sale, over them can escape the consequences of his negligence by asserting that he is not the absolute legal owner of them. The failure to define "owner" cannot be treated as restricting the meaning of that expression to that extent."

The English decisions are however not strictly in point. The Animals Act 1971 in England enacts that "livestock belongs to the person in whose possession it is." The Common Law prior to 1971, as stated in 1 Halsbury's 3rd Ed. para. 1270, was that for the purpose of actions for trespass an owner includes a person having possession or control: *Knott v. London County Council* 1934 1 K.B. 126 at 141, per Lord Wright. That, however, was a civil action brought by person bitten by a dog which was not the property of the defendant Council or its servants. It is more relevant in the present context to examine Fiji Ordinances, particularly those of a penal character. In the Dogs Ordinance, Cap. 145, which was in force when the Trespass of Animals Ordinance was passed, there is an express provision that "owner of a dog" means the keeper of the dog, and includes the occupier of any building where any dog is ordinarily kept, and any person who may harbour a dog. If it had been intended that the term "owner" with regard to cattle should be interpreted in the same sense, then it is hard to understand why the Trespass of Animals Ordinance should contain no such definition. That

being so, it would appear that the word "owner" should in this Ordinance be limited to the strict definition of the term.

In the Oxford English Dictionary "owner" is defined as "one who owns or holds something; one who has the rightful claim or title to a thing." It is a little difficult to understand exactly what is meant by the word "holds" in that definition, and whether it applies to personal as well as real property. If the second half of that definition is applied here, it would rule out the appellant as the owner of the cattle concerned, as he certainly did not have a rightful claim or title to the cattle. In many English statutes "owner" is defined as it is to be interpreted for the purpose of the particular statute, and these definitions vary considerably. Where it is not defined in the relevant Act the British courts have given a number of definitions, having regard no doubt to the general provisions of the Act in question. In *Cory and Son v. Dorman Long & Company* 155 LT 53, for example, it was held that "owner" in the Merchant Shipping Act 1894 does not include a person who has complete control and possession of a ship with no property either at law or in equity therein.

Counsel for the appellant cited a number of Australian decisions, but we do not find them strictly relevant as they concern offences under statutes in which the term "owner" is defined. For example: section 391 of the Criminal Code in Queensland provides that with regard to the offence of theft, the term "owner" includes the owner or any person having possession or control of the thing in question; the same wording appears in section 291(2)(c) of the Fiji Penal Code, Cap.11. This definition would appear

to indicate that in the ordinary sense of the word "owner" would not include a mere possessor.

Most of the authorities cited concerned ownership of land and other forms of real property. These, however, are irrelevant to the question of ownership of personal property. As is said in 29 Halsbury 3rd Ed. page 372:

"The ownership of goods differs from the ownership of land in that the common law did not treat land as the subject of absolute ownership but only of tenure."

Further, in paragraph 737 the principle is set out in these words:

"An owner is prima facie entitled to possession, or to recover possession, of his goods against all the world....He may however voluntarily or involuntarily part with possession e.g. by the pledging, lending, hiring out, bailment, theft or loss of his goods, in any of which cases he is left with the right of ownership without possession, accompanied or unaccompanied, as the case may be, with the right to possess."

This statement of the law is, in our view, strictly pertinent to the facts of the present case. The ownership of the cattle was definitely vested in the American company. The appellant could perhaps be properly regarded as a bailee. Undoubtedly the American company could - in the absence of special terms in the arrangement between the parties, which have not been proved - have given instructions to the appellant to hand over the cattle to some other person or even to ship them to the company in America. As it had power to deal with the cattle in any of these ways it is clear that the rights of ownership remained vested in the company.

Much stress in the argument before us was laid on the contention that the responsibility for keeping

the cattle in order, and ensuring that they did not trespass outside the boundaries of their own field, lay on the person in charge of them, with the duty of looking after them. This is a thoroughly reasonable argument. It is perfectly clear that the company in the United States could do nothing to keep the cattle within the limits of their own grazing ground. The only person who had the power to do this, in the present case, was the appellant or some servant or agent appointed by the appellant. But that does not of itself determine the liability of the appellant to conviction under the Ordinance.

The Trespass of Animals Ordinance is a penal statute. It must be strictly interpreted in accordance with its own terms. The Ordinance expressly lays the burden on the owner. If it had been intended to include in the term "owner" the person having charge of the cattle for the time being, then it would have been easy to insert a definition in much the same way as was done in section 2 of the Dogs Ordinance. It is quite true that unless the word "owner" in the Trespass of Animals Ordinance is widened to include the person in control of the cattle then many offences under that Ordinance must necessarily go unpunished. We agree that in interpreting an Act of Parliament due regard should be had to the general purpose of the Act concerned. But the Court must be careful not to give such a decision as would overstep mere interpretation and in effect amount to judicial legislation.

In the present case the appellant was undoubtedly in default in his failure to keep the cattle under proper control. But he cannot be convicted of an offence under the Ordinance unless the definition of the offence in the Ordinance is

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wide enough to include the circumstances of the present case. As has been pointed out, there would have been no difficulty in the first instance in doing what was done in the Dogs Ordinance. But that was not done; and as we see it the appellant cannot correctly be described as an owner in terms of section 3 of the Ordinance.

For these reasons, though as we have said the conduct of the appellant was definitely blameworthy, we must hold that his actions do not bring him within the strict scope of the penal section in the Trespass of Animals Ordinance. Accordingly the appeal must be allowed and the conviction quashed. If the fine has already been paid then the amount should be refunded to the appellant.

(sgd.) T. Gould  
VICE-PRESIDENT

(sgd.) C.C. Marsack  
JUDGE OF APPEAL

(sgd.) G.D. Speight  
JUDGE OF APPEAL