[1979] 25 FLR 242

SUPREME COURT OF FIJI

Appellate Jurisdiction

SAMUELA NAINIMA

v.

REGINAM

[SUPREME COURT, 1979 (Grant, C. J,), 26 October]

Appellate Jurisdiction

Larceny–any portion of a dead domestic animal can be the subject of Larceny.

The facts were that the appellant had for sometime been troubled by trespassing cattle. On 31 May, 1979 he and another endeavoured to chase a way such cattle, but in a fit of anger, killed one beast. Later it was decided to eat the animal. Portion of if was removed cooked and eaten. At the hearing the following observations were made. As to the time of killing there was no larceny, as no animus furandi–no intention of stealing. The offence charged refers to a live animal-a whole animal. And a dead domestic animal can be the subject of larceny. Accordingly the court quashed the conviction and substituted a conviction for simple larceny of the thighs of the animal. The substitution was empowered by Criminal Procedure Code s. 163.

Held: Appeal upheld. Conviction pursuant to Penal Code s. 294 substituted.

Cases referred to:

Same v. Same (1823) 171 E.R.1132.
R v. Edwards Stacy (1877) 13 Cox C. C. 384.
Ali Moharnmed Hassani Mpanda v. Republic (1963) E.A. 234.

GRANT, C.J.

On the 6th June 1979 at Tailevu Magistrates Court the appellant and another (hereinafter called the second accused) were convicted on their own pleas of larceny of cattle contrary to section 307 of the Penal Code, and were each sentenced to fifteen months' imprisonment.

The appellant appealed against sentence, but this Court took notice of the fact that from the record it was far from clear whether the essential ingredients of the offence were established, and called for a probation report to clarify the position.

The appellant was living with his parents on their farm and owned a dalo plantation about a mile away. He had for some time suffered considerable damage to his crops as a result of cattle trespass, and on the morning of the 31st May 1978 when he went to his plantation with the second accused he again found cattle in his plantation and his crops badly damaged. He and the second accused started chasing the cattle out of the plantation, in the process of which the appellant, while infuriated and emotionally upset, killed a bull. Both the appellant and the second accused were frightened by what had happened, left the plantation, and returned to their respective homes. Later that day the second accused went to the appellant's home and asked him what should

be done about the dead bull and they finally decided "to eat the meat". So they returned to the plantation, removed the thighs from the carcase and cooked and ate them in a cave.

On the following day the second accused accompanied the appellant to report what had happened to the Turaga ni Koro, who was not at home, but the appellant and the second accused claim that they informed a member of the family. A few days later the appellant and the second accused were interviewed by the police and admitted what they had done.

The appellant and the second accused were then charged with larceny of cattle contrary to section 307 of the Penal Code which provides that:–

> "Any person who steals any horse, cattle or sheep is guilty of a felony, and is liable to imprisonment for fourteen years."

However the facts above related do not constitute the offence of larceny of cattle, as it is clear that what was stolen was only part of an animal; that at the time of the theft the animal was dead; and that at the time it was killed there was no animus furandi, that is to say that at that time neither the appellant nor the second accused had the intention of stealing. The bull was killed by the appellant in a fit of anger, and it was only at a later stage that the appellant and the second accused formed the intention of stealing part of the carcase.

The offence of larceny of cattle contrary to section 307 of the Penal Code envisages a live animal (*Same v. Same* (1823) 171 E.R 1132) and, *ipso facto*, a whole animal; and indeed it is for this reason that section 322 of the

Penal Code was enacted so as to cover the case of persons who kill certain animals with the intention of stealing all or any part of same and which provides:–

> "Any person who wilfully kills any animal with intent to steal the carcase, skin, or any part of the animal killed, is guilty of a felony, and is liable to the same punishment as if he had stolen such animal, provided that the offence of stealing the animal so killed would have amounted to felony."

Consequently, had the appellant unlawfully killed the bull with the intention of stealing any part of it he should have been charged with "Killing an animal with intent to steal contrary to section 322 of the Penal Code", and could have been sentenced to the same punishment as for larceny of cattle contrary to section 307 of the Penal Code. But as the appellant had no intention of stealing any part of the bull at the time he killed it, an ingredient of that offence is also missing.

That is not to say that on the facts no offence or offences have been committed. It is an offence to unlawfully kill an animal capable of being stolen, by virtue of section 359 of the Penal Code which provides that:–

> "Any person who wilfully and unlawfully kills, maims or wounds any animal or bird capable of being stolen, is guilty of a misdemeanour."

Further, a dead domestic animal can be the subject of simple larceny *(R Y. Edwards and Stacey)* (1877) 13 Cox C.C.384) so long as it has not been discarded as worthless by the owner or otherwise abandoned; and consequently any part of such dead animal may be the subject of simple larceny, as in the case a *fortiori* with

any part of the live animal. This is implicit in section 90(7) of the Penal Code which provides that:–

> "Everything produced by or forming part of the body of a creature capable of being stolen is capable of being stolen."

Thus, on the facts of this case, the appellant could have been, and should have been, charged with two separate offences. Firstly, with killing the bull with contrary to section 359 of the Penal Code. Secondly, and jointly with the second accused, with the offense of simple of simple larceny contrary to section 294 of the Penal Code, in that they thereafter stole the thighs of the dead bull.

This court cannot substitute a conviction for killing an animal as it is not a cognate offence (*Ali Mohammed Hassani Mpanda v Republic*) (1963) E.A 294) but it can, by virtue of section 163 of the Criminal Procedure Code, substitute a conviction for simple larceny.

The conviction of the appellant is accordingly quashed and in substitution therefor he is convicted to larceny contrary to section 294 of the Penal Code.

The appellant is eighteen years of age with no previous convictions and it would appear, from the contents of the helpful and detailed probation report, that in all the circumstances he may well benefit from a period of probation.

The sentence is quashed and in substitution therefor the appellant is placed o probation for a period of two years, the supervising court to be Tailevu Magistrates Court.

So far as the second accused is concerned the position will be adjusted under the revisional powers of this court.

Appeal allowed; Conviction quashed and substituted; sentence varied.