

IN THE SUPREME COURT OF THE
TERRITORY OF PAPUA AND NEW GUINEA

Appeal No. 8 of 1956.

Appeal from District Court, Wewak.

THE UNIVERSITY
OF
PAPUA & NEW GUINEA
THE LIBRARY

WATAU

Appellant

and

JOHN HENRY PURCELL and
GEOFFREY ROBERT BURFOOT

Respondents.

JUDGMENT DELIVERED BY MR. JUSTICE BIGNOLD
ON 1st NOVEMBER, 1956.

The appeal in this matter is in respect of an alleged stealing by finding and it is of a class of charge notoriously difficult and in respect of which there has been much divergence of judicial opinion.

At the outset it should be noted that Criminal Code Section 391(5) has special reference to such cases. That Sub-Section provides:-

"When a thing converted has been lost by its owner and found by the person converting it the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing

- (a) does not know who is the owner and
- (b) believes on reasonable grounds that the owner cannot be discovered."

In this case of finding, the conversion alleged is one subsequent to his original possession which was an innocent one.

The onus is upon the Crown to show that either he knew the owner when he converted the article (a lighter) or if he did not know the owner at this time, that the circumstances were such that he could not have believed on reasonable grounds that the owner could not be discovered. It is not for the accused to show this on the balance of probabilities, but the burden of proof is always on the Crown. The provisions of the Sub-

Section do not exhaust the matter, because facts may be given in evidence otherwise that the conversion was not a fraudulent one.

In this appeal from the District Court at Wewak, the facts seem undisputed. The appellant, a native employee at the Wewak Point Hotel, found a lighter under a table in a public section of the premises. This lighter was not marked in any way from which the owner could be discovered, and the finder admittedly did not report his find to the licensee or to the Police. It was sought to prove his fraudulent intention by this failure. The owner promptly reported his loss in the Hotel, but there is no evidence that knowledge of this came to the appellant, who says he placed the lighter quite openly in the kitchen pending some claim for it by the loser and it remained there a week, until noticed by the licensee.

Whilst a prudent person might have reported the find to the licensee and the Police, I know of no duty to do so. It seems to me that there is a wide distinction between finding a lost article in a private home, in which case an honest person would inform the householder, since, prima facie, it would be his, and the case of the finding in a place to which the general public has access such as in an Hotel.

Of course, if it could have been shown that the loss had been brought to the notice of the finder and he chose to say nothing, that would be enough to show a fraudulent conversion.

There is some equivocal evidence on this subject about which the Court has tried to get further evidence, but the presiding Magistrate is absent on duty in the field, and it is quite understood that it may be impracticable to recall him speedily for the purpose of taking evidence as to the equivocal portion. In the interests of justice, therefore, I do not propose awaiting the result, but will resolve that evidence in the accused's favour.

Larceny, by finding, involve questions of some nicety and depend upon the whole circumstances, and this makes it imperative for the Court, when the original possession was innocent, to be quite sure that this possession changed from an innocent one to a guilty or fraudulent one.

In my view, the evidence in this case did not lead to that irresistible conclusion. I therefore allow the appeal and quash the conviction.