1941 *Present :* **Moseley S.P.J.**

SALGADO *v.* MUDALI PULLE.

514—M. C. Chilaw, 14,804.

Criminal misappropriation—Alternative charge of theft or dishonesty receiving stolen property—Doubtful offence—Criminal Procedure Code, ss. 181 and 182.

Where an accused is charged with theft of property or in the alternative with dishonestly receiving or retaining the said property,—

Held, that he could not be convicted of criminal misappropriation without a fresh charge.

Rasiah v. Rajadurai (*3 C. L. W. 104*) followed.

APPEAL from a conviction by the Magistrate of Chilaw.

Barr Kumarakulasingham, for accused, appellant.

H. W. R. Weerasooriya, C.C., for the Crown.

cur. adv. vult.

October 1, 1941. MOSELEY S.P.J.—

The appellant was charged with the theft of two buffaloes, in the alternative, with dishonestly receiving or retaining the said buffaloes knowing or having reason to believe the same to be stolen. The learned

[1] *2 C. W. Rep., page 317.* [2] *5, S. C. Decisions, p. 38.*

Magistrate held that the appellant had been "found in recent possession dishonestly, of the buffaloes" and convicted him of the offence of theft. He was sentenced to one month's rigorous imprisonment.

The learned Magistrate was acting on the presumption which section 114, illustration (*a*), of the Evidence Ordinance (Cap. 11) permits the Court to make. The essence of that presumption, however, is that the goods, in possession of which an accused person is found, have been stolen. The buffaloes in this case were not proved to have been stolen. The only evidence in regard to their disappearance from the estate on which they were tethered is that of the estate watcher who, going on his rounds, looked for the buffaloes "but they were missing". He had tied them up with strong rope, but it is not impossible that they strayed of their own volition from the estate which was unfenced on one side.

The story of the appellant is that he found the buffaloes on the road, and thought that one of them was an animal which he himself had lost at some time previously. He took them to the house of the Headman, but that official was away. He wanted, he said, to hand the animals over to a responsible person, presumably in order that inquiries might be made.

The learned Magistrate rejected his defence and convicted the appellant as stated above. It is clear, I think, that the conviction for theft cannot be sustained. The charge of retention stands on the same footing.

Crown Counsel, however, contends that, since the defence has been disbelieved, appellant could have been convicted of criminal misappropriation. I think that the contention is sound. That would appear to have been the proper charge upon the facts as they must have been known to the prosecution. The appellant however was not so charged. Still, Crown Counsel urges, upon the charge as laid, he could have been convicted of criminal misappropriation, and he relies upon the provisions of sections 181 and 182 of the Criminal Procedure Code (Cap. 16), which are as follows:—

> "If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with all or any one or more of such offences and any number of such charges may be tried at one trial and in a trial before the Supreme Court or a District Court may be included in one and the same indictment; or he may be charged with having committed one of the said offences without specifying which one".

> "If in the case mentioned in the last preceding section the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed although he was not charged with it."

Counsel for the appellant, however, contends that these sections do not apply, since, on the facts in possession of the prosecution there should have been no doubt as to the particular offence, if any, which had been committed. He relied upon *Rasiah v. Rajadurai*[1]. In that case the

[1] *3 C.L.W. 104.*

accused had been charged with cheating and was convicted of criminal breach of trust. Maartensz J. said: "Clearly the offence, if any, committed by the accused is one of criminal breach of trust, and it was not open to the learned Police Magistrate to convict him of that offence without charging him afresh". So, here I do not think that the appellant could properly have been convicted of criminal misappropriation without a fresh charge alleging that offence.

In view of the confusion that appears to have arisen in respect of the identity of the animals found in the possession of the appellant with those produced in Court I do not think it would be fair to the appellant to order a new trial on the appropriate charge.

I would allow the appeal; the conviction and sentence are set aside.

Set aside.