

Present: Lyall Grant J.

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ANCHAPULLAI v. BAKER *et al.*

525—P. C. Teldeniya, 14,424.

*Appeal—Accused found guilty—Discharged and ordered to give security for good behaviour—Criminal Procedure Code, s. 325 (1).*

Where an accused person, on being found guilty, was discharged and ordered to give security for good behaviour,—

*Held, that the accused had a right of appeal from the order.*

**A** PPEAL from an order of the Police Magistrate of Teldeniya.

*Navaratnam*, for appellants.

*Abeysekere*, for respondent.

October 3, 1929. LYALL GRANT J.—

The appellants were convicted of theft of the carcass of an elk and ordered to give personal bail in Rs. 100 each to be of good behaviour for six months.

The appeal is on a question of law on the ground that there was an entire absence of criminal intent and that the judgment is contrary to law.

It is admitted that the accused removed the animal from the spot where it was lying, and the question for decision is whether this was done with the intention of taking dishonestly the property out of the possession of the complainant (section 366, Criminal Procedure Code).

A dishonest intention is an intention to cause wrongful gain to one person or wrongful loss to another person (section 22).

“ Wrongful gain ” is gain by unlawful means of property to which the person gaining is not lawfully entitled.

“ Wrongful loss ” is loss by unlawful means of property to which the person losing it is legally entitled (section 21).

The learned Magistrate has found that the accused removed the animal from the possession of the complainant. He has not definitely found that this was done either by force or by stealth, unless his assertion that he believes the prosecution story includes the belief that the first accused raised his cane to strike the man left in charge of the elk.

There is no special reference to this important fact in his judgment. Nor has he made any finding on the point whether the accused acted in *bona fide* error as to the ownership of the animal.

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The case for the prosecution is that the complainant shot the elk on Crown forest, that he went to find coolies to carry it away and left two men in charge, that while he was away the accused came with several coolies and removed the elk, the first accused raising his cane in a threatening manner.

There is nothing in the evidence to contradict the accused's assertion of his belief that the animal was shot on his estate. To my mind, on the evidence there can be little doubt that the first accused *bona fide* believed that the animal was shot on his estate. The prosecution witness Muttan does not assert that he told the accused that the animal was shot in Crown forest, nor does he assert that he made any protest of any kind when the accused removed the animal.

I cannot find in the evidence, anything which discloses dishonest intention on the part of the accused, and on this ground the accused is entitled to acquittal.

It was argued on behalf of the Crown that there was no right of appeal in the case as there had been no conviction, the Magistrate having dealt with the case under section 325 (1).

It has been more than once held by this Court that there is a right of appeal from an order under section 325 (1) on the ground that such an order is a final order and therefore appealable under section 338.

I would refer to the recent decision of my brother Akbar in *Inspector of Police, Avissawella v. Fernando*,<sup>1</sup> which reviews the authorities.

The petition of appeal shows that the appellants look on the judgment as a conviction.

A finding of guilty was recorded and the accused were bound over for six months.

It was however matter of agreement between Counsel who appeared in this Court that the procedure adopted by the Magistrate was in effect an order discharging the appellants under section 325 (1) (b).

As it has been held that an appeal lies from such an order, the question whether there has been a conviction is only of importance in order to determine whether the accused's right of appeal is under section 335 or section 338.

The only sentences referred to in section 335 are fine and imprisonment, and the right of appeal on the facts depends on the severity of the sentence.

These are the only punishments which by section 15 a Police Court has power to inflict.

I think the appeal is under section 338, and on the authorities referred to the accused have a right of appeal both on the law and on the facts.

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On the facts the question is whether one is to believe the story of Muttan or of the estate superintendent or of the assistant superintendent.

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The superintendent's story is that he received information that an elk had been shot on the estate and that he went to see with some coolies. He was shown the spot where the animal had been rolled down by the third accused. Suppiah came up and showed where the animal was lying hidden near the road. He remained there about twenty minutes and then had the animal removed. He says that there was no one there and that Muttan's story is absolutely false. He met the fourth accused, the assistant superintendent, about a quarter of a mile from the spot. He kept the animal till 5 P.M., then cut it up, distributed the meat, and informed the Police.

The learned Magistrate has accepted the story for the prosecution without criticism although there are a number of points which appear to call for explanation.

He subjects the story for the defence to analysis which I am bound to say seems to me to be hypercritical.

For example, both the European witnesses agree that the fourth accused was not at the spot. The witness Suppiah says that the fourth accused was sent for by the first. This is treated as a contradiction although Suppiah did not say that the fourth accused came to the spot nor was the first accused asked whether he had sent for the fourth accused or the fourth accused asked whether he had received such a message.

The criticisms refer to minor inconsistencies which would appear capable of explanation.

On the other hand there are points in the prosecution evidence which seem to call for explanation.

The important fact in issue is whether the first accused had reasonable belief that the property in question had been stolen from him. The first accused says that he was told that the animal had been shot on his estate, and that he was shown the place where the animal had been rolled down.

Assuming that, when the first accused found the animal concealed beside the road (which is in harmony with Muttiah's evidence) and we are to believe Muttan's story that he was there in charge of the animal and that he told the accused that it had been shot by the complainant, there is nothing to show that Muttan said it had been shot anywhere but on the land of the accused.

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The *bona. fides* of the accused is to my mind beyond question. But it is only fair to the accused to say that while I have not had the advantage possessed by the Magistrate of seeing the witnesses, I am much more impressed by the evidence for the defence than by that led for the prosecution.

The appeal is allowed and all the accused acquitted.

*Appeal allowed.*

