1923.

Present : Bertram C.J.

GUNASEKERA *v.* SOLOMON *et al.*

682—P. C. Matara, 29,021.

Theft—Intention to cause annoyance to complainant—Larceny—Difference between English law and the Penal Code—First offenders—Sentence of imprisonment inappropriate.

Where accused having an intention not of stealing but only of causing annoyance or "injury" to the complainant drove away his cart and bull.

Held, in the circumstances that he was not guilty of theft.

BERTRAM C.J.—"I do not think that there is any substantial difference between the English law of larceny and the Ceylon law of theft so far as this class of case is concerned. The English law draws a distinction between trespass and larceny. Many acts are acts of unlawful trespass which nevertheless cannot be considered as crimes."

"The policy of the law is that first offenders should so far as possible should not be sent to jail."

H. J. C. Pereira, K.C. (with him *Wijesekere*), for the appellants.

R. L. Pereira, for the respondent.

December 12, 1923. BERTRAM C.J.—

I have every sympathy with the learned Magistrate's desire to enforce order in his district, and every respect for his opinion that a sentence of imprisonment in cases like this is the best means of

enforcing order. On the other hand, I do not think that he has applied his mind to the legal question which the case involves. Despite the refined expositions which one may discover in text-books on the subject, I do not think that there is any substantial difference between the English law of larceny and the Ceylon law of theft so far as this class of case is concerned. The English law draws a distinction between trespass and larceny. Many acts are acts of unlawful trespass which nevertheless cannot be considered as crimes. There is a case cited (*R. v. Philipps*[1]), where some men at night broke into a stable, took out the horses, and drove them for thirty miles, left them at an inn, and went on their journey. That was held to be a case of trespass and not of theft. There is an Indian case which is very much on all fours with the present. I refer to the case of *Nabi Babsh v. Queen Empress.*[2] There the Court said—

> "To constitute theft there must be an intention to take the thing in question dishonestly, that is, with intent to cause wrongful gain or wrongful loss, and can it be said that removing a box 'to put the owner to trouble' is necessarily and in every case causing 'wrongful loss?' The answer must, we think, be in the negative. No doubt the language of section 23 of the Indian Penal Code which defines wrongful loss, and says a 'person is said to lose wrongfully when such person is wrongfully kept out of any property as well as when such person is wrongfully deprived of property,' might at first sight seem to create a difficulty in the way of accepting the view we take. But the difficulty is only apparent and not real. Of course, when the owner is kept out of possession with the object of depriving him of the benefit arising from the possession even temporarily, the case will come within the definition. But where the owner is kept out of possession temporarily not with any such intention, but only with the object of causing him trouble in the sense of moral anxiety, and with the ultimate intention of restoring the thing to him without exacting or expecting any recompense, it is difficult to say that the detention amounts to causing wrongful loss in any sense."

In this case the Magistrate says that there can be no doubt that the accused were not bent so much on stealing the bull and half cart as on causing annoyance or injury to the complainant by their driving away the cart and bull. The injury there referred to is not an injury in the nature of wrongful loss. It is clear that this was an act of trespass of a malicious nature done with the object of causing annoyance, and I do not think that it can be considered as theft within the meaning of our law.

[1] *11 East 662.*

[2] *I. L. R. Cal. XXV., 416.*

1923.

BERTRAM C.J

Gunasekera v. Solomon

Nevertheless, the act is highly reprehensible. It seems unfortunate that there is no offence in the nature of criminal trespass in respect to movables. There is one offence, however, which the accused persons have committed as part of the same transaction, and that is the offence of criminal intimidation. I propose, therefore, to amend the conviction to a conviction under sections 483 and 486.

The learned Magistrate has sentenced the accused to imprisonment. I feel the force of what he says. Nevertheless, it is brought to my notice that these offenders are young men, and that this is their first conviction. It is most undesirable to familiarize young men of this description with the inside of a prison. Their act is no doubt reprehensible, but there are other ways of dealing with the act than imprisonment. I am informed that they are of a respectable class. The policy of the law is that first offenders should, so far as possible, not be sent to jail, and I think that in this case it would be best that I should extend leniency to the accused. I propose, therefore, to send the case back to the learned Magistrate so that he may bind over the convicted persons under section 325 (2) of the Criminal Procedure Code. If action is taken under that section they may be required to come up for judgment when called upon ; and if this case does not prove a sufficient warning, they will be punished for this offence, if necessary, by being sent to prison. I trust that the learned Magistrate, in binding over the accused to be of good behaviour and to appear for sentence when called upon in such sureties as he considers appropriate, will address a fitting warning to the accused, and will make it clear to them that their punishment in this case is not remitted, but only suspended.

Conviction and sentence varied.