1960 *Present :* **Sinnetamby, J.**

ATTORNEY-GENERAL, Appellant, *and* B. MENTHIS, Respondent

S. C. 678—M. C. Hambantota, 33,204

Criminal misappropriation—Ingredients of offence—Must there be an initial innocent taking ?—Theft—Penal Code, ss. 366, 386—Evidence Ordinance, s. 114 (a).

In order to constitute criminal misappropriation of property it is not necessary that there should be an initial innocent taking followed by a subsequent dishonest change of intention. If the initial taking of the property not in the possession of any person is itself dishonest, then too the offence is made out.

Two bulls belonging to S were let loose by his herdsman for grazing on a pasture land. The accused was subsequently found at 10.45 p.m. driving the bulls away from the pasture land at a distance of 1¼ miles in circumstances showing that the accused intended to take the bulls for his own use, to the detriment of the owner.

Held, that the accused was guilty of criminal misappropriation and not of theft.

[1] *(1958) 60 N. L. R. 428.* [2] *(1956) 58 N. L. R. 234.*
[3] *(1914) 17 N. L. R. 321.*

APPEAL from a judgment of the Magistrate's Court, Hambantota.

V. S. A. Pullenayegum, Crown Counsel, for the complainant-appellant.

M. M. Kumarakulasingham, for the accused-respondent.

Cur. adv. vult.

March 14, 1960. SINNETAMBY, J.—

The accused in this case was charged with dishonest misappropriation of two bulls valued at Rs. 150/- property belonging to one S. P. Samichiappu, an offence made punishable under Section 386 of the Penal Code.

At the conclusion of the trial, the Magistrate took the view that the offence established by the evidence was not criminal misappropriation but theft and he accordingly acquitted the accused. Against this finding, the Attorney-General has appealed.

The facts as found by the Magistrate are as follows :—The two bulls in question belonged to one Samichiappu and they were given to his herdsman who let the animals for grazing. The animals were let loose on the pasture land called Madawinna which Samichiappu describes as " my pasture land ". The accused was found driving the two head of cattle by the police and the Village Headman about 1¼ miles away from Madawinna at a place called Nonagama. This incident occurred at about 10.45 p.m., in the night. The fact that the accused was driving the cattle away from the pasture land at a distance of 1¼ miles shows that the accused was at that time intending to take the animals to some place which certainly was not the owner's. One does not ordinarily expect a person at 10.45 p.m. to drive cattle, which are not his, unless he intended to take them for his own use, to the detriment of the owner. The learned Magistrate while holding on the facts with the Crown and while rejecting the defence put forward by the accused came to the conclusion that, on the facts, the charge of criminal misappropriation was not made out.

In order to constitute criminal misappropriation, the Magistrate held, there must be an innocent taking followed by a subsequent dishonest change of intention. He also states that there is no proof of any overt act indicating that the accused had converted or appropriated the animals to his own use. I think it must be conceded that the nature of the overt act required to constitute conversion depends on the article converted. If one finds an article which is in common daily use, has no identifying marks, can easily be carried on one's person, and takes it ; then, in the absence of other evidence, the mere taking is not sufficient to indicate a conversion because it may be a neutral act consistent with an innocent taking with a view to returning it to the lawful owner : but, if the property is of a kind that cannot be easily carried on one's person, and is capable of being easily identified, as in this case, by the brand marks ; then, driving it away from where it is kept normally, after dark, must surely indicate that the intentions of the alleged offender are not honest. What was the

need to drive them at all if the alleged offender intended to find the owner ? He only had to leave the animals where they were and inform the owner or inform the nearest Village Headman, but that is not what the accused did. He drove them 1¼ miles away from where they were grazing. They may, of course, have strayed, but even if they had strayed there was no need to drive them in the way in which these two head of cattle were being driven when the police saw the accused. It is also clear from the evidence that the accused had been driving the animals for a short distance before the police party became aware of his approach. Incidentally, these two animals were not by themselves, alone, but they were being driven along with some other animals which belonged to the accused ; suggesting, thereby, that the accused was driving them to a place where he ordinarily keeps his own animals. That fact too indicates that the accused intended to convert these animals also to his own use. I cannot, therefore, agree with the Magistrate that in this case there was no overt act in proof of the conversion.

The only question that now remains for consideration is whether, to constitute criminal misappropriation, there should be an initial innocent taking. Would it be criminal misappropriation if the initial taking was also dishonest? In this particular case, it is not clear whether the initial taking was honest or dishonest because there is no evidence in regard to how, where, when, and in what circumstances, the accused first came by the animals. If it was an innocent taking, then his subsequent act of driving them along with his own animals would, in my opinion, amount to an act of dishonest conversion and would clearly amount to criminal misappropriation ; but if the original taking was also dishonest, what would the resulting offence be ? The learned Magistrate thought that it would be theft because the property, he thought, was at that time, in the custody of the herdsman on behalf of the owner ; but there is no evidence at all of this fact and the cattle may well have strayed after the herdsman had left them on the pasture land. From the mere possession of the cattle by the accused, one cannot apply the presumption created by Section 114 of the Evidence Ordinance in the absence of proof that the animals had been stolen, and hold that he was either the thief or the receiver of stolen cattle. If, for instance, there was evidence that the animals had been tethered and that the ropes had been cut, then, on the circumstantial evidence, one may have legitimately inferred that there was a theft ; but in th absence of anything to show that the property had been stolen, the presumption is inapplicable. It applies only if the recent possession was in respect of goods shown to be, or proved to have been stolen.

In the present case one can hardly say that the cattle had been stolen by somebody. They may well, as I have said, have strayed and then been taken possession of by the accused. In the alternative, the accused may have taken possession of the animals in the pasture land itself. Even in that case, in my opinion, it cannot be said to have been in the possession of the herdsman. There is nothing to show that the pasture land was enclosed or was under the control of the herdsman or was even the private property of the owner or the herdsman. No doubt,

there are decided Indian cases in which, in certain circumstances, cattle in the control of a herdsman on pasture land have been held to be in the possession of the owner, but there are also other Indian cases in which the opposite view has been taken. It depends entirely on the facts of each particular case. The Magistrate relied on a case to which Ratanlal in his commentary made reference but Ratanlal has also referred to a case where a person who took possession of a bullock which had strayed but in respect of which there was no evidence that it was stolen property, in which it was held that the accused was guilty of criminal misappropriation and not of theft, *Phul Chand Dube*[1]. Our own courts have taken the view that where there is no definite evidence of theft and there is a possibility of the cattle having strayed the proper charge is one of criminal misappropriation and not theft. In *Salgado v. Mudali Pulle*[2] the evidence showed that it was not possible to say if the cattle were stolen or had strayed of their own accord. The only evidence was that they were tethered in an estate and that when the watcher went on his rounds he found them missing. This was even a stronger case than the present one. The accused in that case was convicted of theft but the Supreme Court held that the proper offence in respect of which the conviction should have been entered was criminal misappropriation. In the recent case of *Gratiaen Perera v. The Queen*[3] a bench of two Judges considered whether in order to constitute the offence of criminal misappropriation it was necessary for there to be established an initial innocent possession followed by a subsequent dishonest conversion, but for the purpose of that case it was not necessary to decide the question and the matter was left open. There are, however, dicta of this Court supporting the view that there should be evidence of an innocent initial possession followed by a subsequent dishonest conversion to constitute the offence. In *Georgesy v. Seyadu Saibo*[4] Justice Middleton took the view that where an accused person initially comes by a cheque dishonestly he cannot be convicted of criminal misappropriation. At the same time the learned Judge stated that the offence of receiving stolen property was not made out and the presumption from recent possession was not applicable as there was no evidence that the cheque had been stolen. In spite of the immorality of the accused's conduct, the learned Judge felt obliged to acquit him. A somewhat similar view was expressed by Justice Walter Pereira in *Kanavadipillai v. Koswatte*[5]. In that case, of course, there was in point of fact an innocent initial taking but in dealing with the question the Judge thought that there could be no criminal misappropriation unless the possession of the thing alleged to have been misappropriated was come by innocently and retained by a subsequent change of intention: the evidence was insufficient to show a subsequent dishonest conversion and the learned Judge on that ground set aside the conviction and acquitted the accused. The question, therefore, did not specifically arise for decision in that case. If one looks at the express provisions of Section 386 of the Penal Code there is nothing in it to suggest

[1] *1929 Allahabad 52.*

[2] *(1941) 43 N. L. R. 94.*

[3] *(1960) 61 N. L. R. 522.*

[4] *(1902) 3 Brown's Reports 91.*

[5] *(1914) 4 Balasingham's Notes of Cases 74.*

that there should be an innocent initial taking. One cannot help wondering whether in expressing the view that an initial innocent possession was necessary to constitute criminal misappropriation Judges were influenced by the principles governing the English law of larceny. To constitute larceny the initial taking must also be dishonest. If the initial taking was innocent a subsequent dishonest detention of the article taken would not amount to larceny or to any other offence under the English Law. In the case of *Moynes v. Coopper* [1] where Moynes was charged with larceny the facts showed that into his pay packet was put more money than he was entitled to. He took it originally innocently, not knowing what the packet contained; but, even though he later knew that it contained more than what was due to him, he dishonestly decided to misappropriate it to his own use. He was charged before the Justices who convicted him of larceny but in appeal the conviction was set aside on the ground that the original taking was innocent. The decision in *Moynes v. Coopper* (*supra*) which merely perpetuated the existing law in England, was the subject of much criticism in legal circles and provoked one commentator in the Law Quarterly Review to remark "if other countries have a sensible law of theft why should we not have one too".

The Penal Code departed in this respect from the English law and made it an offence to misappropriate property even if the original possession was honest. Explanation 2, it seems to me, was merely intended to emphasize the difference between the law in England and under the Code but it does not postulate that in order to constitute criminal misappropriation the initial taking must always be honest. Indeed it suggests that an initial dishonest taking also amounts to criminal misappropriation for it states that a person who finds property and takes it "for the purpose of protecting it for, or of restoring it to, the owner, does not take or misappropriate it dishonestly", thereby suggesting that if the finder does not take it for such a purpose he will be guilty of the offence. The main provisions of Section 386 make dishonest misappropriation at any stage an offence; explanation 2 only provides for a special case where the initial taking is honest and is intended to protect the finder of property not in the possession of anyone so long, and only so long, as his continued possession of that property is honest. If, of course, the property taken was in the possession of some person the resulting offence would be theft.

In my opinion, therefore, in order to constitute criminal misappropriation under our law it is not necessary that there should be an innocent initial taking. If the initial taking of the property not in the possession of anyone is dishonest then too the offence is made out. In regard to this, I agree with the view expressed by Justice Moseley in *Salgado v. Mudali Pulle* (*supra*).

I would accordingly set aside the order of acquittal entered by the learned Magistrate and substitute in its place a verdict of "guilty". I would also remit the case back to the Magistrate with directions that he should convict the accused of the offence charged and impose an appropriate sentence.

Acquittal set aside.

[1] *(1956) 1 Q. B. 439.*