

1916.Nov. 9.The C.J.,
Gordon, J.,
Ferguson, J.

REX v. NUNDAH.

Criminal law—Larceny—Claim of right—Mens rea—Honest belief—Reasonable grounds—Proof of animus furandi.

Where a prisoner charged with larceny sets up that he took the article under a claim of right, the question for the jury is whether he honestly believed the article to be his, and not whether he had reasonable grounds for so believing.

CRIMINAL APPEAL.

The appellant was tried at Lismore Quarter Sessions on 14th Aug., before *Docker*, D.C.J., on a charge of stealing two heifers, the property of Amir Khan, on the 26th May, 1916. He was found guilty and sentenced to twelve months hard labour.

The trial Judge reported as follows :—

The prisoner and Amir Khan are Indians, and were occupying adjoining farms. They both speak English, and Amir Khan also writes English. His account was that on October 15th, 1914, he bought eleven calves at the sale-yards in Lismore. He drove them out to his farm 27 miles from Lismore; and three days after, branded them with his brand, A.K. with a scroll. The two heifers in question, a red and a roan, were two of the cattle so bought and branded. They remained in his paddock till, at the end of July, 1915, he missed the red heifer; and in October, 1915, he missed the roan heifer. It appears that a drought was prevalent at the time, paddock gates were left open, and everyone's stock was allowed to roam about in search of feed. In November, 1915, he got information from a Mr. Cooper; and he recovered the roan heifer in Cooper's paddock. He did not see the red again until January, 1916, when he saw it in the prisoner's paddock, and claimed it. The prisoner said "It looks like my heifer, there is no brand on it." Amir pointed out the brand, and said "Look, this is my brand." The prisoner said, "It looks like the way yours are branded." Amir Khan took her away without any objection on the part of the prisoner; and the two heifers remained in Amir Khan's paddock till the 26th May, 1916. On that day Amir Khan

went to Lismore, and about a mile from the town met the prisoner coming out. The next day, having returned home, he missed the two heifers. Not finding them, he informed the police on June 1st ; and on July 18th, with Sergeant Brennan, found the two heifers in Southwell's paddock at Nimbin, about six miles from Hanging Rock, where the parties reside.

Sergeant Brennan, when making inquiries, saw the prisoner on June 10th and asked him "What did you do with those two heifers of Amir Khan's?" The prisoner made no reply ; but his mate, Joalla, who was with him, said "Oh, that case is all settled." On July 17th, he arrested the prisoner on warrant. On the way to the lock-up, prisoner said "First time heifer belong to me. Amir Khan branded them in mistake," apparently claiming the animals as his own property ; and this was the defence set up at the trial.

From the evidence of Edward Herbert Rose, a farmer, whose paddock is on the opposite side of the creek to those of the prisoner and Amir Khan, it appeared that on August 28th, 1915, the prisoner sold the red heifer in question with five others to Rose. She calved in September, and Rose milked her till December, when she was allowed to go dry owing to the drought, and was turned out. The purchase was afterwards rescinded. Rose got his cheque back, and re-delivered the five other head to the prisoner, telling him that he could also take back the red heifer which was absent at the time. This no doubt accounts for the fact that Amir Khan found her in the prisoner's possession in January. The brand on the red was indistinct, and Rose does not appear to have noticed it until her hair was clipped after she was recovered by the police. He also said that he had seen the roan heifer at his place. In November, 1915, she was taken with Dixon's cattle to Cooper's place, and left there by Dixon, who had been unable to separate her from his own cattle. Rose further gave evidence that on May 26th, he saw the prisoner drive the two heifers out of Amir Khan's paddock into his Rose's paddock, and thence to the road towards Nimbin. He was not near enough to him to speak to him. Cross-examined, he said that he knew the roan from May of last year, but had never noticed any brand on her till about the end of October, when he saw Amir Khan's brand

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on her, and that it appeared to be freshly put on. He also said that on one occasion Amir Khan was at his milking-yard, when the red heifer was in it, and that he made no claim in respect of it.

John Dixon, a farmer at Nimbin, said that the prisoner in the end of May brought the two heifers to his place, and said "I have put two heifers in your paddock." Dixon said "I don't want them there." Prisoner said "I will pay you sixpence a week for grass for them, as I have sold my farm." They remained a fortnight in Dixon's paddock. Cross-examined, Dixon said that, when he left the roan at Cooper's in November last, Amir Khan's brand appeared to be freshly put on—he thought, about a fortnight before.

Amir Khan also gave evidence that on June 12th, two days after Sergeant Brennan had questioned the prisoner, the prisoner and his mate, Joalla, saw him at Green's place, and a conversation took place, Joalla being the chief speaker. Eventually Joalla offered to buy the two heifers for the sum of £10, which was about half their value, and also to return to Amir Khan two coils of barbed wire which belonged to Amir Khan, but which had been taken by the prisoner, and in respect of which Amir Khan had taken out a summons. Amir Khan reduced the offer to writing, witnessed by Green, but afterwards having learnt where the heifers were, he repudiated the agreement and refused to take the money when offered. Green deposed that afterwards Joalla and the prisoner came to him, and asked him to go to the prisoner's solicitor and make a statement to him to the effect that Amir Khan had accepted the money, which he refused to do, as it was not true.

Knox Ellis, stock inspector, who had long experience in cattle brands, and had examined the brands of the heifers after they had been clipped, gave it as his opinion that both had been branded at the same time, but the brand on the red had not taken very well. He admitted that after twelve months it was very difficult to say how long a brand had been on a beast.

For the defence the accused gave evidence that in March, 1915, he bought through the auctioneers, Rutherford and Shannon, some cattle which belonged to an Indian named Bindoo; that Amir Khan bought some cattle at the same time, and they

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drove the two lots home in one mob ; that in August he missed two heifers, a red and a roan, and also a ' store ' cow ; that he told Amir Khan he thought they must be in his paddock, but Amir Khan said he had not seen them ; that the next day he saw Amir Khan driving the red heifer, and claimed it as his, pointing out that it was not branded ; that Amir Khan allowed him to take it away, and next day he sold it to Rose with five other head, and subsequently got her back from Rose ; that in November he saw the roan at Cooper's, and claimed it, but Cooper would not give her up as she had Amir Khan's brand on ; that he had a conversation with Amir Khan, who said that if Bindoo identified it as one of those he had sold to the accused he would give it up.

Bindoo was called, and said that he recognised the two heifers as two of those he had sold to the accused in March, 1915 ; they were unbranded. Several Indian witnesses were called who said that they had heard Amir Khan say that if Bindoo identified the heifers he would give them up. Mr. Firth, a clerk of Rutherford and Shannon, gave the dates on which parties had bought cattle from them. The jury inspected the heifers, and on their return they said they were satisfied as to the brands.

The prisoner desires to appeal on the ground of my direction to the jury. I did not put it to the jury as a principle of law that they should ascertain whether the prisoner had any reasonable grounds for a belief that the cattle were his own, but as a matter of common sense. The principle has, however, been recognised by the legislature in the Crimes Act with reference to the defence against a charge of bigamy of belief in the death of the former husband or wife, and also in the English Courts on the same point. The reason is equally applicable to other instances where belief is a defence. The prisoner produced evidence, which, if true, would establish amply " reasonable grounds " ; but the jury did not believe it.

E. B. DOCKER,
Chairman.

The prisoner appealed on the ground (amongst others) that his Honour was in error in directing the jury that, in finding

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whether the accused took the cattle under a bona fide claim of right, they should consider whether he had any reasonable grounds for such belief. In his summing up the learned Judge said : " The defence is that the accused took these cattle under a claim of right, that is to say, honestly believing that they were his own property ; two of those which he had bought from Bindoo. It is not sufficient to allege merely ' I took the article in question under a claim of right.' It is clearly necessary to show that there are reasonable grounds for the belief that they were his. If the accused succeeds in doing that, that he had reasonable grounds for believing these animals to be his, then it is no matter whether they were his in fact or not ; he would not be guilty of stealing, and it would be your duty to acquit him. The Crown asks you to say that he had no reasonable grounds for believing that they were his What you have to decide as material to the defence is whether the accused really believed they were his cattle. To do that you must look to see whether he had reasonable grounds for believing it."

Young, for the prisoner. His Honour did not properly direct the jury as to the real matter to be considered upon a defence that the cattle were taken under a bona fide claim of right. Where a prisoner is charged with larceny and claims the goods to be his own, the true question is, not whether he had reasonable grounds for believing them to be his but whether in fact he honestly did so believe. The question is, had the accused a felonious intent ; was there an *animus furandi* ? If he honestly believed the goods were his, then however absurd or unfounded or ignorant may be the grounds of such belief, there can be no *mens rea* or felonious intent. What some third party, the hypothetical " reasonable man," would have thought or done under the circumstances can afford no possible guide to the state of mind of the accused. The sole question is was the prisoner's action honest or dishonest. If he in fact thought he had a right to do the act, his mind was honest, and the proof of the *animus furandi*, a necessary element in larceny, is not proved : *R. v. Cooper* (14 S.R. 426 ; 31 W.N. 164) ; *R. v. Dickson* (4 S.C.R. 298) ; *R. v. Hall* (3 C. & P. 409) . In *East's Pleas of the Crown* (vol. 2 p. 659), it is stated " if there

be any fair pretence of property or right in the prisoner, or if it be brought into doubt at all, the Court will direct an acquittal, for it is not fit that such disputes should be settled in a manner to bring people's lives in jeopardy."

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White, for the Crown. A defence such as the accused sets up in this case may be of two kinds. It may be a bona fide claim of right, or it may be that the accused acted on a mistake of fact. The two things are, I submit, distinct: *Laws of England*, vol. 9 s. 505. A bona fide claim of right is where a man openly and intentionally does an act with the object of asserting his right or title, as where he openly trespasses in order to claim title to land, or seizes goods which he alleges are his property. It has frequently been held in this Court, in cases within the summary jurisdiction of magistrates, that if the claim is honest and bona fide, even though unreasonable, the jurisdiction is ousted, as in *In re Parker* (5 W.N. 7). But there is no authority in the English cases that a belief in the honesty of a claim, if it be obviously unreasonable, is sufficient to show the absence of a guilty mind. If an act is morally wrong and forbidden by law, *mens rea* may consist of the mere intent to do the act: *Laws of England*, vol. 9, s. 501, 504 (note h.). And in *R. v. Tolson* (23 Q.B.D. 168) *Stephen, J.*, says, at p. 188: "A bona fide claim of right excuses larceny and many other offences against the Malicious Mischief Act. Apart indeed from the present case, I think it may be laid down as a general rule that an alleged offender is deemed to have acted under that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence."

But admitting that an honest belief, however groundless, will support a claim of right, I submit that the present case is merely a case of a mistake as to the facts. The prisoner did not take the cattle in the assertion of a claim, he took them furtively and hid them; all the accompanying circumstances were such as usually accompany a theft, and his defence is that there was a mistake as to the identity of the beasts; that he thought they were his beasts, and took them by mistake. He never went to Amir Khan and said "those are my cattle; I am going to take them." If he had done so that would have been a claim of right.

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But he took them clandestinely and now says : “ Oh, I thought they were mine.” Under those circumstances he must show that he had reasonable grounds for so thinking. A mere colourable pretence is not sufficient : there must be a bona fide belief, founded on reasonable grounds, even though it be mistaken. He referred to *R. v. Tolson* (23 Q.B.D. 168) ; *R. v. Prince* (L.R. 2 C.C.R. 154). Starkie on Evidence, 3rd ed. 606 ; The Queensland Criminal Code Act, 63 Vic., No. 9, s. 24.

THE CHIEF JUSTICE. The most important point argued in this case concerns part of the direction given by the Judge to the jury. The accused was indicted for larceny of two heifers. There was a large body of evidence proper to go to the jury on the question of guilt. But the defence set up was that the cattle were taken under a bona fide claim of right. There was evidence that there had been conversations between the accused and the owner of the cattle prior to the time of the taking of evidence upon which, if the jury believed it, they might accept the defence that there was a genuine dispute about the ownership of the cattle. Or they might reject the defence altogether, and believe either that there never was or that there was not at the time of the taking, any honest belief that the cattle were those of the prisoner.

In his direction to the jury, to which in other respects I can see no exception to be taken, there is a passage upon which the present motion is mainly founded. The Judge told the jury “ It is clearly necessary to show that there are reasonable grounds for the belief that they were his. If the accused succeeds in doing that, that he had reasonable grounds for believing these animals to be his, then it is no matter whether they were his in fact or not ; he would not be guilty of stealing and it would be your duty to acquit him. The Crown ask you to say that he had no reasonable grounds for believing that they were his.” Later on he said : “ What you have to decide as material to the defence is whether the accused really believed they were his cattle. To do that you must look to see whether he had reasonable grounds for believing it.

Now I think what the Judge had in his mind was that the statement on oath by the accused that he believed the cattle to be his would not be enough to establish the defence unless

it were seen under the circumstances of the case that the accused might honestly and reasonably form the opinion that they were his. But this must have regard to his own state of mind, because a man may be a stupid, unreasonable, or wrong-headed man, without being a dishonest one. The form of direction actually given to the jury is in my opinion open to the objection that it substitutes as a test of honesty the intellectual process of the jury applied to the particular facts, rather than asking them to judge what was the actual state of the mind of the accused. The gist of the action of larceny besides the taking is the felonious intent. There must be a *mens rea*, a dishonest intention to deprive the rightful owner of the property in the goods. Russell on Crimes, I think, fairly sets out the way in which the matter is generally approached in the criminal practice of the Courts. In the 7th edition at page 1189 it says: "It is not larceny to take goods on a claim of right or property in them, if there is any fair pretence of property or right. It is in each case a matter of evidence whether they were bona fide so taken, or whether they were taken with a thievish and felonious intent; and obtaining possession of goods by a fraudulent claim of right or by a fraudulent pretence of law, and then running away with them is larceny".

In our own practice in New South Wales, the question whether such a defence is made out has, I think, always proceeded upon those lines. The question for the jury is whether the man was honest or not, that is to say, whether he was honest in the act of taking, or not. I think the cases of *Regina v. Dickson* (4 S.C.R. 298); *R. v. George* (11 N.S.W. L.R. 373), and other cases, bear that out. There are instances where the existence of reasonable grounds for an alleged belief is required where a defence is set up that there was no *mens rea*. There are other cases where the thing prohibited by a statute is punishable whether there is a guilty mind in the doing of it or not. But in the case of larceny where the question is between honesty and dishonesty, the guilt or innocence of a man cannot, as I understand the principles applicable to that branch of the criminal law, be made to depend upon a consideration by the jury whether he had reasonable grounds for his belief. The

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question whether he honestly believed the property to be his is that which is material. Possibly some of the strongest beliefs held by human beings might be found by other minds to be completely destitute of reasonable grounds. They may depend on nothing more than the associations of early childhood or the gossip of his neighbourhood after a man has grown up, or the customs of the community in which he lives. But the question of thief or no thief is a question of honesty or dishonesty in the act charged as theft. A man may be ever so much mistaken in his reasoning processes and yet be honest, though you would not accept his mere statement of opinion unless there was some colour in the circumstances for his entertaining the opinion he claims to have had. It is for the jury then to decide whether he honestly claimed those cattle, or whether he dishonestly took them, and I do not think that the submission of the question, in the form in which it was put, presented that issue to the minds of the jury. For that reason, and because I think in the absence of that direction there was evidence on which they might have convicted, it seems to me that the conviction must be set aside and a new trial ordered.

GORDON and FERGUSON, JJ., were of the same opinion.

New trial ordered.

Attorneys for the prisoner : *Sullivan & Macdermott* (Lismore).