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62
SUPREME COURT
KINGSTON
JAMAICA

IN THE COURT OF APPEAL

Judgment Book

SUPREME COURT CRIMINAL APPEAL Nos. 74 & 79 of 1975

BEFORE: The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Zacca, J.A.
The Hon. Mr. Justice Henry, J.A.

REGINA vs. LANCEY SIMPSON & ARTHUR RAINFORD

Mr. Berthan Macaulay, Q.C. for applicant Lancey Simpson.

Mr. W.B. Brown for applicant Arthur Rainford.

Mrs. V. Gayle for the Crown.

February 16, 17, 18: March 11, 1977

Henry, J.A.:

The applicants were, together with three other men, jointly charged on an indictment containing three counts. The first count alleging larceny of cattle was in respect of two cows the property of one Rosa Collins, the second count was for receiving the unskinned carcasses of those cows knowing them to have been stolen. While the third count was for killing the cows with intent to steal their carcasses. When the matter came up for trial in the St. Thomas Circuit Court the first count of the indictment was amended so that the particulars of the offence related to larceny of the unskinned carcasses of the cows, but no amendment was made to the statement of offence which still alleged larceny of cattle contrary to section 6 of the Larceny Act instead of Larceny contrary to section 5 of the Act. The trial proceeded and the applicants were convicted on the first and third counts of the indictment, no verdict being taken on the second count. The applicants sought leave to appeal against their convictions and their applications having been refused by a

single judge they applied to the Court.

On January 29, 1975, Rosa Collins left three cows and a young bull in a pasture at Cambridge Hill in the parish of St. Thomas. On the morning of January 31, 1975, she returned to find the heads of one cow and the bull and their entrails in the pasture. The carcasses were missing. She reported the matter to the police and later that day she attended the C.I.D. Headquarters in Kingston where she was shown carcasses of animals which she identified and claimed as hers. Earlier on the same morning at about 3.30 a.m. the police had observed five men removing unskinned meat from a Hillman motor car to premises at 12A Carpenters Road in St. Andrew. The applicant Simpson operates a meat shop at these premises and he was one of the five men. When the men started moving more unskinned meat from a Toyota motor car parked nearby, the police accosted them and held Simpson along with two of the men. The other two men escaped but were subsequently arrested, one of them being the applicant Rainford. The carcasses identified by Rosa Collins formed part of the meat which the police saw the men unloading.

The first ground of appeal argued before us is that the conviction on count 1 of the indictment was bad in law in that the applicant was charged with larceny of cattle contrary to section 6 of the Larceny Act while the particulars as amended disclosed the offence of simple larceny. It was further argued that the Court of Appeal has no power to amend the statement of offence because to do so would be to substitute a new offence for that charged and this is authorised neither by section 61 of the Criminal ^{Justice} (Administration) Act which is restricted in its operation to indictments or proceedings in which questions of law are reserved for the Court of Appeal under Part III of the Act nor by section 20 of that Act which in any event is confined to the amendment of "defects and errors" in any proceeding in criminal cases. We accept the interpretation placed on section 61 of the Criminal Justice (Administration) Act, but not that placed on section 20. It is true that section 61 appears to

119

64

distinguish between "indictment" and "~~proceedings~~" so that on the face of it a reference elsewhere in the Act to "proceedings" could be regarded as a reference to proceedings other than an indictment. But section 61 draws the distinction it does because that section is dealing with criminal proceedings on indictment and with summary proceedings which may be by way of information or complaint. Section 20 on the other hand is dealing in the earlier part of the section exclusively with criminal cases in the Supreme Court and Circuit Court which are all triable on indictment so that the reference there to "any proceeding in criminal cases" must clearly include a reference to the indictment in those cases and the reference to "all such amendments as may be necessary for the purpose of determining in the existing proceeding the real question in issue" would be meaningless if it did not refer to amendments to the indictment in those proceedings. In our view an indictment which contains a count alleging larceny of cattle while the particulars indicate larceny of carcasses is clearly defective. Furthermore when the particulars of that count were amended to relate to carcasses the statement of offence remained unamended. That was obviously an error. On either basis, therefore, it would be open to the court to amend the statement of offence in count 1 of the indictment. The only remaining consideration is whether such an amendment would work injustice to the applicants. We do not think that it would.

In delivering the judgment of the court in R. v. Alan Harden (1962) 46 C.A.R. 90 at p. 99 Lord Widgery had this to say:

" The wide powers of amendment conferred by section 5 (1) of the Indictments Act, 1915, can never be exercised so as to cause injustice to the prisoner, and, as this court recently pointed out in Martin (1961) 45 Cr. App. R. 199 (at p.206):
"After arraignment it is doubtful whether a new count can be added at all as the defendant will not have pleaded to it nor, if the trial has started have been put in charge of the

" jury on it; and if it were made, injustice would almost certainly be caused." We think that the same observations apply to an amendment of an existing count if the result is to substitute a new offence for that originally charged, but the distinction between an amendment which charges a new offence and one which merely corrects a misdescription of the original offence may be one of degree depending on the circumstances of the particular case. "

These observations would apply equally to the exercise by this court of the powers conferred by section 20 of the Criminal Justice (Administration) Act. But where, as in this case, an amendment properly made at the trial has not achieved its full purpose because of the failure to make the appropriate corresponding amendment to the statement of offence we would regard the unamended statement of offence as a misdescription of the offence which may without injustice to the applicant be amended by this court.

There can be no doubt that defence counsel was aware of the nature and effect of the amendment to the particulars proposed at the trial, which proceeded on that basis throughout thereafter the accused having been first pleaded to the charge as amended.

Looking at the entire summing-up we do not consider that the jury could have been in any doubt that the charge they were considering on count 1 was larceny of carcasses and not larceny of cattle. That is the charge on which their verdict was ultimately taken and in all the circumstances we consider that we ought to amend the statement of offence in count 1 of the indictment to read "Larceny, contrary to section 5 of the Larceny Act" and so order. This will effectively dispose of the first ground of appeal. It will also dispose of the second ground of appeal to the effect that the learned trial judge erred in law in directing the jury that count 2 was alternative to count 1.

Groups 3 and 4 are as follows:

121

68

3. Assuming that Count 2 was alternative to Count 1 there was absolutely no evidence that the Applicant Simpson knew that the unskinned carcasses were stolen. His statement from the dock (see page 7 of the Summing-Up) was uncontradicted by any evidence adduced by the Prosecution.

4. There was absolutely no evidence that the Applicant Simpson took part in the killing of cows as alleged in Count 3 of the Indictment. In fact there was absolutely no evidence whatsoever that he was in the vicinity where the cows were killed either at the material time or any other time. "

The grounds may be dealt with together. There was evidence before the jury that all five accused were engaged in removing unskinned meat from motor vehicles to a beef shop at 3.30 a.m. on January 31. Some of this meat was identified and claimed by Rosa Collins. The animals from which the meat came had been left in a pasture on January 29. In so far as Simpson was concerned there was evidence that he was a butcher and that the unskinned meat was being removed to his shop. In so far as Rainford was concerned there was evidence that he told the police "A really me kill the cow". If the jury accepted this evidence it was ample evidence on which to convict each accused on counts 1 and 3 of the indictment.

For these reasons we consider the applications for leave to appeal ought to be refused. In so far as the applicant Rainford is concerned the sentence imposed on count 1 is in excess of the maximum provided for that offence. We, therefore, set aside the sentence of 7 years imprisonment imposed on count 1 and substitute a sentence of 5 years imprisonment with hard labour. In view of the time which has elapsed since his conviction we order that his sentences commence with effect from March 17, 1976.

J. Swaby