

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. GERVASIO GUMARANG AND TORIBIO GUMARANG, DEFENDANTS AND APPELLANTS.

G.R. No. 9267. March 02, 1914

Ponente: TRENT, J.

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TRENT, J.:

This is an appeal by Gervasio Gumarang and Toribio Gumarang from a judgment of the Court of First Instance of the Province of Isabela convicting them of the theft of a carabao.

The appellants insist that the court erred: (1) In finding them guilty of the crime charged; and (2) in finding that the carabao supposed to have been lost or stolen was the property of Francisco Tumaliuan.

Francisco Tumaliuan testified that his carabao, valued at P220, was stolen on November 27, 1911; that on Wednesday he discovered the head, feet, and a portion of the hide of the animal; that on December 2, 1911, when he was on his way to attend a wedding at a house to the east of the house of Gervasio Gumarang he saw some of the meat of his carabao; that he then went to a neighboring house and told Vicente Mallillin that he had eaten some of his carabao at the house of Gervasio Gumarang ; that Vicente laughed and told him, "Here are the horns of the carabao I cut off when I went to help kill that carabao;" that the meat was found oh the fence at the house of Gervasio Gumarang where it had been placed to dry; that he could positively identify the head, horns, and pieces of the hide which he discovered; that he knew they were from his carabao because he had the animal in his possession every day before it was stolen; that he did not yet have a certificate of ownership for the animal in his own name, but that he secured the animal from Florencio Fulgan, having traded some land for it; and that he was about to have the certificate of transfer made at the time the animal was stolen.

Isidro Mesa, a councilman, testified that on December 2, 1911, Tumaliuan reported to him concerning the loss of his carabao and the finding of the bones, horns, and meat; that he made an investigation; that he, the lieutenant of the barrio, Francisco Tumaliuan, and Eufrosina Mallillin went to the house where the meat was found, and found some meat on the fence of Gervasio Gumarang; that he then called the justice of the peace and a policeman to the place where the meat was and turned the meat over to them. The witness further testified that without the use of force, violence, or intimidation, Vicente Mallillin confessed that he had helped the other defendants kill the carabao of Francisco Tumaliuan, and that the pieces of horn found in Vicente's house exactly fitted the stubs of the horns of the head found by Francisco.

Eufrosina Mallillin and Aurea Balisi testified to having seen the two appellants in possession of carabao meat shortly after the time that Vicente Mallillin confessed to have assisted them, the appellants, in killing the offended party's carabao.

Vicente Mallillin, who was charged in the same complaint but was later excluded on motion of the fiscal to be used as a witness for the prosecution, testified that he and the two appellants killed the carabao of Francisco Tumaliuan on November 27, 1911; that Gervasio Gumarang arrived about 9 o'clock at night of that day with the

carabao which he said had been taken from the offended party's barrio; that he, the witness, was invited to help kill it; that his house was about 60 yards distant from the house of Gervasio; that he did not see the brand of the animal, but that he knew it was Francisco's, as he was very familiar with it because the animal was for some time very close to his house.

The defense at first attempted to prove that a carabao of the appellants had recently died and that they had used the meat. The intention evidently was to show that the meat found on the fence, was that of the animal which died from disease. This course was finally abandoned, as Gervasio Gumarang absolutely denied that any meat was found in his possession. Vicente Mallillin, an accomplice, testified positively that the appellants stolie the carabao, and he was fully corroborated in all essential details. The guilt of the appellants of having stolen and killed a carabao is therefore established beyond question of a doubt.

In support of their second assignment of error, appellants' counsel quote from section 8 of Act No. 1147, which pro vides that the certificate of ownership therein provided for shall be prima facie evidence that the animal is the property of the person therein named as owner.

Counsel also quote section 22 of the same Act, which provides: "No transfer of large cattle shall be valid unless registered and a certificate of transfer secured as herein provided."

It is a well-settled principle of law that a material variance between the allegations and the proof as to the ownership of the stolen property in cases of larceny is fatal to a conviction. (Underwood vs. State, 72 Ala., 220; King vs. State, 44 Ind., 285; Jones vs. Com., 17 Gratt., Va., 563; State vs. Wilson, 6 Ore., 428.) The legal title to the stolen carabao in the case under consideration was not in Francisco Tumaliuan, but he, Francisco, was in the lawful possession of the animal. He held the carabao by right of his contract of purchase.

In the case of Fowler vs. State (100 Ala., 96) Thomas J. Fowler was convicted of the theft of an ox alleged to belong to Charles L. Phillips, The evidence tended, to prove that Phillips had purchased the ox from Malone & Collins. On cross-examination Phillips was asked, "if it was not the understanding at the time he got the ox from Malone & Collins that he should keep the oxen until fall, and that if he was able to pay for them he was to take them; otherwise, he was to pay rent on them to Malone & Collins." To this question the witness answered in the affirmative. He was then asked "if he had ever paid Malone & Collins for the oxen, or offered to pay them for the same." The State objected to this question, the court sustained the objection, and the defendant duly excepted.

In deciding the case on appeal the supreme court of Alabama said:

"It was immaterial whether Phillips had paid, or offered to pay, Malone & Collins for the oxen or not. If he was in possession of them, at the time of the alleged larceny, either as a conditional purchaser or a bailee, the ownership was properly laid in him."

The subject of the allegation and proof of ownership in cases of larceny is discussed in 25 Cyc, and on page 91 thereof is the following comment: "Any legal interest in the goods, although less than the absolute title, will support an allegation of ownership. But there must be an actual legal interest, not a mere claim or expectation of interest. Thus a seller who has delivered the goods cannot be described as owner merely because negotiations are pending between him and the buyer for canceling the sale. So claiming ownership and attempting without success to do acts of ownership is not enough to justify a description as owner. The ostensible ownership is, however, enough to justify the description. So far as the thief is concerned, he cannot question the title of the apparent owner."

On pages 89 and 90 in Cyc, vol. 25, under the heading, "Who should be laid as owner," we find the following: "The actual condition of the legal title is immaterial to the thief; so far as he is concerned, one may be taken as the

owner who was in peaceable possession of it, and whose possession was unlawfully disturbed by the taking. The possessor of the goods from whom the thief took them may therefore properly be described as owner in the indictment. The possession must be actual; right of possession alone will not suffice. Nor a general direction and control, not amounting to a legal possession. The goods need not be in the actual manual possession of the person described as owner at the moment of taking; it is enough that he was legally the possessor. Upon this principle the property of goods stolen may be laid in a bailee from whom they were taken, as for instance in a common carrier, an innkeeper, a pledgee, a receiver, a hirer or borrower, a cestui que trust, one in possession under a contract for purchase, a washer woman who has the goods to wash, or a coachmaker who has a coach to repair, or a lienor, a manufacturer who is performing work on the materials of another, a cashier of a bank, or a constable who has attached or taken the goods in execution."

Although the actual legal title to the stolen carabao may not have been in Francisco Tumaliuan, he was the peaceable possessor of the animal by reason of having purchased the same from Florencio Fulgan. By reason of this purchase, accompanied with the actual possession, Tumaliuan had a real or legal interest in the animal. The actual condition of the legal title was immaterial in so far as the appellants are concerned. They took the animal from the actual possession of Tumaliuan, the apparent owner. They cannot now be heard to say that Tumaliuan was not the owner.

The penalty imposed by the trial court is not the penalty provided by law for the offense committed. The carabao stolen was valued at P220; hence, according to arts. 518 and 520 of the Penal Code, as amended by Act No. 2030, the proper penalty to be imposed upon the appellants is the penalty next higher in degree than *arresto mayor* in its medium degree to *presidio corressional* in its minimum degree, which is *presidio correctional* in its medium degree to *presidio mayor* in the minimum degree. There being present no aggravating or mitigating circumstances, the medium degree of the proper penalty must be imposed. The judgment appealed from is therefore modified by substituting four years two months and one day, *presidio correctional*, in lieu of the two years eleven months and eleven days imposed by the trial court. In all other respects the judgment is affirmed, with costs against the appellants.

Arellano, C. J., Carson and Araullo, JJ., concur.

Moreland, J., concurs in the result.

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