CRIMINAL REVISION.

Before Coxe and Mullick, JJ.

HARENDRA NARAYAN DAS

v.

RAMJAN KHAN.*

1913

Aug. 20.

Theft—Penal Code (Act XLV of 1860) s. 379—Custom, plea of—Conviction under s. 379 unsustainable without the finding that the accused had no right to the subject-matter of the theft.

Where the accused is charged with theft he cannot be convicted of the offence of theft or of causing wrongful gain or wrongful loss without a clear finding that he had no right to the subject-matter of the theft.

IN this case the accused Harendra and his servant were charged with theft—Harendra of abetment, and his servant of the substantive offence of theft. It appears that the servant was bringing a cart-load of firewood from the zamindar's forest when the cart-load was impounded. Harendra immediately ran to the *thanah* and laid a charge of unlawful detention of his cart and the firewood. He was followed by the zamindar's servant. There was, then, a talk of compromise but it fell through. Thereupon Harendra's servant was charged with theft. Next day, when Harendra applied for the release of his bullocks, he too was charged along with his servant for abetment of theft. Harendra set up immemorial custom as his defence. He contended that from time immemorial the residents of the village had been cutting and taking firewood from the zamindar's forest for household consumption, though not for sale.

* Criminal Revision No. 1050 of 1913, against the order of J. F. Graham, Sessions Judge, Assam Valley Districts, dated May 12, 1913.

1913

HARENDRA NARAYAN DAS v. RAMJAN KHAN.

They were put upon their trial before the Sub-divisional Officer of Goalpara. They were tried together; Harendra under section $\frac{379}{109}$ and his servant under section 379 of the Indian Penal Code. The Sub-divisional Magistrate convicted Harendra and acquitted the servant. Against this order Harendra appealed to the Sessions Judge of Assam Valley Districts who rejected his appeal.

Harendra then moved the High Court and obtained this Rule.

Mr. H. N. Sen (with him *Babu Sahayram Bose*), for the petitioner, contended that there was no finding that the accused had no right to the firewood. The finding that he had *no* right was essential and the absence of that finding vitiated the conviction. He further submitted that A and B having been charged with abetment and theft respectively, there could be no conviction for abetment when the person charged with the substantive offence was acquitted.

Mr. C. R. Das (with him *Mr. Burdalois*), for the Crown, submitted that in revision the Court could not go behind the question of fact found by the lower Court. And the finding was against the accused, namely, that he had failed to establish the plea of *bona fide*.

COXE, J. This was a Rule on the District Magistrate of Goalpara to show cause why the conviction of the petitioner for an offence under section 379, read with section 109, of the Indian Penal Code, should not be set aside on the ground that there was no dishonest intention in the act complained of. The petitioner has been convicted of abetment of theft and the property said to have been stolen was wood taken from the forest.

It appears from the judgment of the Magistrate that it was urged on behalf of the petitioner that he had a right to take wood without a pass. The Magistrate, however, refused to decide whether the petitioner had such a right or not. He says:—"I think it is beyond the province of this Court to adjudicate whether such right exists or not;" and in the conclusion of his judgment he also refused to go into the question "whether the tenants have any such right as has been set up in this case." But he found that inasmuch as the accused had himself taken passes for the removal of wood from the forest, his claim to take wood without a pass could not possibly have been made in good faith. It does not appear to me that the question of good faith really arises in this case. From the passage I have quoted, it is clear that it was the petitioner's case in the Court below that he had a right to take this wood. Before he can be convicted of theft or of causing wrongful gain or wrongful loss, it must in my opinion be found that he had not this right to take the wood. The Magistrate carefully guarded himself from coming to any decision on this point, and therefore it appears to me that whatever the intention and knowledge of the accused was, he cannot be convicted of theft when it has not been found, as a matter of fact, that he was not entitled to the property which he took.

In my opinion, the Rule must be made absolute, the conviction and sentence set aside, and the fine, if paid, refunded.

MULLICK, J. I agree.

S.K.B. *Rule absolute.*