CRIMINAL REFERENCE.

Before Chaudhuri and Newbould JJ.

MOHAMMED HOSAIN

v.

FARLEY.*

1916

Sep. 22.

Railway Passenger—Fraud—Travelling without a ticket but not with intent to defraud—Course open to Railway Administration in such case—Power to forcibly eject passenger—Assault—"Railway"—"Rolling stock"—Railways Act (IX of 1890) ss. 3 (4), (10), 68, 69, 113, 120, 122—Railways Act (IV of 1879), ss. 31 and 32—Enhancement of sentence on hearing of Reference.

The main and primary purpose of ss. 68 and 69 of the Railways Act (IX of 1890) is to prevent persons from travelling in fraud of the Company without payment of the fare, and the obligation to show their tickets when required, is subsidiary only to such purpose.

Travelling without a ticket, in the absence of intent to defraud, is not an offence. In such a case the only course open to the Railway Administration is that provided in s. 113.

There is no provision in the Act for ejecting passengers except in certain circumstances such as are specified in s. 120. S. 122 does not apply to passengers travelling in a railway carriage, as the term "railway" in s. 3 (4) excludes a carriage.

Where a person travelled without a ticket, not with intent to defraud but because he arrived as the train was about to start and was, therefore, unable to purchase one, and when asked for it by the travelling ticket-checkers offered to pay the fare and excess charge on grant of a receipt, but refused to leave the compartment at the next station and purchase a ticket as he was directed to do by the ticket-checkers :—

Held, that the ticket-checkers had no lawful authority to remove him thereupon forcibly from the carriage and to beat him with their fists, and that they were guilty of an offence under s. 323 of the Penal Code.

Pratab Daji v. *B. B. & C. I. Railway Co.* (1) distinguished.

* Criminal Reference, No. 157 of 1916, by S. P. Baksi, Sessions Judge of Noakhali, dated Sep. 5, 1916, against the order of P. Sen, Sub-divisional Magistrate of Noakhali, dated June 26, 1916.

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Butler v. *Manchester, Sheffield and Lincolnshire Railway Company* (1) referred to.

The Court cannot entertain an application for enhancement on the hearing of a reference under s. 438 of the Code. Such applications ought to be made in the usual way, and are not ordinarily entertained on behalf of private parties.

ON the 27th February 1916, the complainant arrived at the Feni railway station, on the Assam Bengal Railway, as the train was about to start, and being unable to purchase a ticket got into a carriage without it. On the journey the accused, A. W. Farley and B. Ross, travelling ticket-checkers of the Railway Company, entered the compartment and asked the complainant for his ticket. The latter explained that he had no time to obtain one, and offered to pay the fare and excess charge. The accused declined to accept the offer, and when the train arrived at the next station (Sarisadi) directed him to get out and purchase a ticket. The complainant refused to do so, whereupon he was forcibly taken out of the compartment, beaten with fists by the accused and made over to the station master. The accused were tried under ss. 323 and 342 of the Penal Code by the Sub-divisional Officer of Noakhali who by his judgment, dated the 26th June 1916, convicted them under s. 323 only and sentenced them to a fine of Rs. 25 each. The material portion of the Magistrate's judgment dealing with the questions of law raised, is as follows :—

A passenger who travels without a ticket commits no *offence* under the Railways Act, but under s. 113 of the Act the excess charge and fare is to be paid by him, and if he refuses to do so the Magistrate recovers the fine for the Railway (*vide* s. 113, cl. (*a*) of the Railways Act). There is no provision in the Act for ejecting a passenger or using force towards him, and the only thing that a Railway Administration can do is to proceed under section 113, cl. (*l*). In the present case it is not contended that the

(1) (1888) 21 Q. B. D. 207.

proper name and address was not given ; consequently, the other provisions of s. 113 of the Railways Act do not apply.

As regards the ruling quoted, I do not think this would apply. In this case (I. L. R. 1 Bom. 52) the complainant did not buy a ticket and tried to buy a ticket afterwards, and he was detained, and it was held that there was no *legal obligation* on the station master to issue a ticket (I. L. R. 1 Bom. 52), but the present case is different. The complainant travelled in the train without a ticket The only thing that can be done is to levy the fare and penalty, and the complainant cannot be taken out by force and kicked on his refusal to go out, or given blows. I have already stated that travelling without a ticket is not a criminal offence [vide *Hart* v. *Buskin* (1)] and it has been held that even if a passenger refuses to pay, the amount can be recovered as a fare and not as a fine. In the present case the complainant *offered to pay*, and he was taken out by force and beaten. I think that there was absolutely no justification for it.

The accused, thereupon, moved the Sessions Judge of Noakhali who referred the case to the High Court, under s. 438 of the Criminal Procedure Code. The material portions of the letter of reference are as follows :—

The other grounds urged are that the Deputy Magistrate should have held that the complainant was a trespasser, that the petitioners were not bound and had no authority to take the fare and penalty, that in case of his refusal to go out of the carriage they had the right of ejecting him from it and in doing so to use such force as was necessary for the purpose and that they were within their rights in dealing with the complainant in the way they did. The learned Deputy Magistrate has first found that the petitioners voluntarily caused hurt to the complainant and committed an offence under section 323, I. P. C. He has then found that complainant was no trespasser and the petitioners had no right to eject him.

On a consideration of the law and the general principles on the subject, I have come to the conclusion that the complainant was a trespasser under the Indian Railways Act (IX of 1890) and also in the ordinary sense of the word, though not a trespasser within the scope of the Indian Penal Code. Section 68 of that Act provides that no person shall, without the permission of a railway servant, enter any carriage on a railway for the purpose of travelling therein unless he has with him a proper pass or ticket. So if a person contravenes this provision his entry into the carriage is unlawful, and in this sense he must be said to be a trespasser

(1) (1885) I. L. R. 12 Calc. 192.

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within the meaning of this Act. Section 122 of the Act provides that, if a person unlawfully enters upon a railway, he may be removed by the servants of the Railway Company in case of his refusal to leave the railway on being requested by them to do so. If I am right in my view that the complainant entered the carriage unlawfully, it follows that the petitioners had the right of ejecting him in case of his refusal. . . . . I should note in this connection that the complainant's case was that he took the guard's permission. The guard has denied it. Rule 80 of the Company's Coaching Tariff shews that under such circumstances the guard should give a certificate in writing. No such certificate was given. The learned Deputy Magistrate should have recorded a finding on this point, but he has not done so. I say that complainant was a trespasser taking it that he did not obtain the guard's permission. Again, apart from those sections, it cannot be denied that the railway line and the carriages belong to the Company, and they have the general rights or the common law rights of ownership over them. That being so, they can exclude or remove any one from them if he enters into or upon them without their consent and without obeying the rules and laws. Therefore, we must see if this power, which is a necessary incident of ownership, has been curtailed or taken away by the Indian Railways Act or any other enactment in force. The learned Deputy Magistrate seems to have found that section 113 of the Indian Railways Act has deprived them of this power. I am unable to agree with him. This is an enabling section empowering the railway owners to have their fare and compensation and providing a machinery for the realization of the same, but it does not, I think, deprive them of their general right of preventing an intruder or trespasser from further travelling without a ticket and of removing him in case of his refusal to go out. The learned Deputy Magistrate has observed that travelling without a ticket has not been made an offence by the Indian Railways Act. I have already said that it is an offence within section 122 of that Act, but supposing that it is not I do not think it is any reason why the railway owners will not have the ordinary rights of ownership referred to above. The case of *Pratab Daji* v. *B. B. & C. I. Ry. Company* (1) seems to have been decided on these principles. So in my opinion the learned Deputy Magistrate ought to have found that the complainant was an intruder or trespasser, and that the petitioners had the right of ejecting him from the carriage, and then to have decided the question whether or not the force or hurt found to have been caused to the complainant was necessary for the purpose of ejecting him. In this view, I would submit that there has not been a proper trial of the case, and would, therefore, make this

(1) (1875) I. L. R. 1 Bom. 52.

reference and recommend that the conviction and sentences be quashed and a re-trial ordered on the lines indicated herein.

Babu Bhagir ith Chandra Das, for the complainant.

Babu Manmatha Nath Mukerjee and *Babu Prabhat Chandra Dutt*, for the accused.

CHAUDHURI AND NEWBOULD JJ. We think the Magistrate was right in convicting the accused under section 323 of the Indian Penal Code.

There is no provision in the Railways Act for ejecting passengers except in certain circumstances, such as are specified in section 120. Section 122 of the Railways Act of 1890 is not applicable to this case. The term "railway" as defined in section 3, clause (*4*) excludes a railway carriage. The term "rolling stock" as defined in section 3, clause (*10*) includes it. There is no provision corresponding to Section 3 sub-clause (*10*) in the old Acts of 1854 and 1879. Section 68 prohibits travelling without a pass or ticket, but so to travel without intent to defraud is not a criminal offence. Here there is a distinct finding that there was no fraudulent intent. Section 113 provides that a person so travelling shall be liable to pay on demand by any railway servant an excess charge. This section corresponds to sections 31 and 32 of Act IV of 1879. It is to be noticed that there was no provision in the Act of 1879 for payment of an excess charge, which is somewhat in the nature of a penalty. Taking that provision in connection with the fact that travelling in a railway carriage without a ticket, but without fraudulent intent, has not been made punishable, we think that the Magistrate has taken an entirely correct view of the law. *Pralab Daji* v. *B.B. & C.I. Railway Co.* (1) was a civil

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case which arose out of a claim for damages for wrongful detention and removal of a passenger. It was decided under the old Act, which has since been amended and altered. The expression "railway" in section 122 as already stated does not include a railway carriage. In addition to the definitions, a comparison of section 120 and section 122 leads to the same conclusion. Railway servants are public servants. They are to act within the four corners of their statutory powers. It was held in *Butler* v. *Manchester, Sheffield and Lincolnshire Railway Co.*(1) by Lord Esher M. R., that no one had any right to lay hands forcibly on a passenger in the absence of some legal authority to do so. Lindley L. J. and Lopes L. J. agreed in that view and held that the company's servants were not justified, in the absence of any by-law or regulation, in laying hands on a passenger.

The main and primary purpose of sections 68 and 69 of the Indian Railways Act is to prevent persons from travelling in fraud of the Company without having paid the necessary fare, and that the obligation to show the ticket, when required, is subsidiary only to such primary purpose. Travelling without a ticket is not a criminal offence, as has been repeatedly held in this Court. It is the frequent practice of ticket-checkers to take money and issue tickets to passengers, who may have got into a train in a hurry, without tickets, as appears from the evidence. In this case the complainant was perfectly willing and offered to pay the fare together with any excess that might be chargeable. Under the circumstances, it would be absurd to hold that the ticket-checkers concerned were legally justified in committing the acts charged against them. The least that can be said about the acts complained of is that they were extremely high-

(1) (1888) 21 Q. B. D. 207.

handed. The complaint was that the accused had abused the complainant and got him out by force and kicked him and given him a beating, that he was kept confined the whole night and was released the next day. The learned Magistrate has found the two accused guilty under section 323 of the Indian Penal Code, and gave them his benefit of his doubt as regards the charge under section 342. The learned Magistrate has also found that the injuries on the person of the complainant were caused by voluntary blows and that those blows were given by the accused with their fists. It is clear that the accused used more force than was necessary for the purpose of removal. The learned Sessions Judge says that, although it is not a case of trespass as defined in the Penal Code, it is at least a civil trespass, and that the owners are entitled to use their common law rights. This is due to his having overlooked the position of a railway company and its servants. He has overlooked the fact that they as such, cannot in a case like this, claim common law rights. Where is there again a "common law right" to inflict blows on a man with fists if he refuses to move?

Ticket collectors and checkers are expected to conduct themselves with restraint and self control. We are disposed to think that they have been leniently dealt with in this case, and refuse the reference. The judgment of the Magistrate, we may add, is characterized by great ability and care.*

E. H. M.

Conviction upheld.

* This reference was on the Undefended List. After the above judgment was signed by the learned Judges, but before it was sent down, an application was made by the vakil for the accused to be allowed to be heard, as he could not appear in time and file his *vakalatnama*, having been misled, as he stated, by the printed list. The learned Judges

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thereupon directed the matter to be placed on the list, and heard him. The learned Judges stated that although they doubted their power to review a judgment already signed, they had given the accused an opportunity to be heard, as they felt that if any ground was shown for reconsidaration of their decision, they might have made a recommendation to the Government stating their views, but they found no reason for altering their views and they affirmed their judgment.

An application was then made by the vakil for the complainant for enhancement of the sentence. The learned Judges held that they could not entertain such an application on the reference, especially as it was not ordinarily entertained on behalf of a private party.

INSOLVENCY JURISDICTION.

Before Greaves J.

KISSORY MOHAN ROY, *In re.**

Insolvency—Practice—Presidency Towns Insolvency Act (III of 1909), s. 36, whether applications under, may be made ex parte—S. 112, rules framed thereunder—Rules 17, 18, 19 and 30.

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June 27.

According to the rules framed by the Calcutta High Court under s. 112 of the Presidency Towns Insolvency Act, applications under s. 36 may be, and are intended to be, made *ex parte*.

APPLICATION.

This was an application on behalf of one Lachmi Chand Karnavat to set aside an order made on April 26, 1916, by the Registrar in Insolvency for his examination under s. 36 (*1*) of the Presidency Towns Insolvency Act. The order was obtained *ex parte* on the petition of one Balkissen Bagri, a creditor of the insolvent, and the applicant sought to have the Registrar's order set aside by the Court on the ground that it was made *ex parte*.

Mr. Langford James (with him *Mr. B. K. Ghosh*),

* Insolvency Jurisdiction ; No. 194 of 1911.