

the Court. I think it very unlikely if the Court's attention had been drawn to these authorities, that they would have expressed the opinion which they did, at any rate, without considerable argument. It is a point, as has been said, not free from difficulty and one which could not be disposed of by a few cursory observations. I think the dictum relied upon is not an authority at all.

BY THE COURT.—The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Walsh.

*EMPEROR v. HAR NARAIN.

Act No. XLV of 1860 (Indian Penal Code), section 430—Mischief—Act No. VIII of 1873 (Northern India Canal and Drainage Act), section 70.

Where the foundation of the charge against an accused person is that he cut the bank of a canal for the purpose of unlawfully obtaining water for his own field, in order to sustain a conviction under section 430 of the Indian Penal Code it is necessary for the prosecution to show that the act of the accused in fact caused, or, but for prompt intervention, would have caused diminution in the ordinary supply of water for agricultural purposes. If this cannot be shown, the accused should be convicted under section 70 of the Northern India Canal and Drainage Act, 1873. *Taj-ud-din v. Emperor* (1) followed.

THIS was an application in revision from an appellate order of the First Additional Sessions Judge of Aligarh.

The facts of the case appear from the following order of the lower court :—

The appellants in this case are two, Har Narain and Chajju. They have been convicted of an offence under section 430 of the Indian Penal Code. It is said that on the night between the 24th and 25th of November, 1918, both the appellants were found cutting the bank of a distributary of the canal and taking water to their fields. To prove the case for the prosecution, four witnesses have been examined, two being officers of the Canal

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* Criminal Revision No. 101 of 1919, from an order of Lal Gopal Mukerji, First Additional Sessions Judge of Aligarh, dated the 9th of February, 1919.

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department and two independent witnesses. All four are agreed that Har Narain was there. As to Chajju, however, Ganeshi and Ram Sarup, who are independent witnesses, state that Har Narain had a man with him, but it was not Chajju. These men are likely to be better acquainted with Chajju than the two officers of the Canal department. Admittedly it was night when the two men committing the mischief were discovered. Under the circumstances I hold that the guilt of Har Narain has been sufficiently established, but not that of Chajju. The learned vakil for the appellants has argued that section 430 of the Indian Penal Code is not applicable to the facts of the case. I think it is. The cutting of a bank of a canal or a distributary is undoubtedly an act of mischief as defined in section 425. Section 430 only defines an aggravated kind of mischief and makes it more heavily punishable. Where the mischief is committed with the knowledge that by the act by which the offence is committed there would be a diminution in the supply of water meant for agricultural purposes, an offence under section 430 of the Indian Penal Code is committed. The water in this case was meant for agricultural purposes, and when that water, or a portion of it, however small, was diverted, a diminution in the supply was effected. It is not necessary for the commission of the offence that the diminution should be appreciable or substantial. As to the sentence, I cannot view the commission of an offence like this with any leniency. The law itself does not regard it in that manner, for it provides for a heavy punishment, i.e., five years' imprisonment, with or without fine. I dismiss the appeal of Har Narain, and acquitting Chajju of the offence with which he been has charged, direct his immediate release, and order that the fine (if paid by him) be refunded.

Mr. M. L. Agarwala, for the applicant.

The Assistant Government Advocate (Mr. R. Malcomson), for the Crown.

WALSH, J. :— In this case I propose to follow the example of my brother KNOX in the case cited to me, viz., *Taj-ud-din v. Emperor* (1), and to convert the conviction into one under

section 70 of the Canal Act, No. VIII of 1873, instead of a conviction under section 430 of the Indian Penal Code. I will just say a word or two for the guidance of the lower courts in this matter, which appears to me to be occurring rather frequently just now, possibly because of the shortage of water due to the failure of the rains. This is the converse case to the one which was referred to my brother PIGGOTT and myself a few days ago. If the act is one which has in fact caused, or, but for prompt intervention, would have caused, diminution in the ordinary supply of water for agricultural purposes, it is an act of mischief within the meaning of section 430 of the Indian Penal Code which has very much more serious consequences than merely interfering with the banks of a canal and may be punished with greater severity; and if having regard to the serious nature of the consequences and to the necessity of severer measures the prosecuting authorities think it right to formulate a charge under section 430, they must call some evidence to prove that within the meaning of the section, the act has caused or must have been known to be likely to cause a diminution of the supply of water for agricultural purposes. That fact ought to be supported by the evidence of some reputable person who knows the facts. On the other hand, if that fact cannot be proved and it is not desired to establish the more serious aspect of the offence, then it is sufficient to prosecute under the section of the Canal Act which I have mentioned with a view to a lighter punishment.

Owing to the fact that there is in this case an absence of evidence directed to section 430, I have adopted the course of altering the conviction.

Following the example of my brother KNOX, I think the sentence of one month appropriate to the circumstances of this case. As the applicant has already served substantially that period and is now on bail, I direct that his sentence be reduced to the amount already served and that his bail be discharged. It is, however, to be understood that if these offences increase in frequency, heavier sentences as a deterrent will have to be administered.

Order modified.

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