

REVISIONAL CRIMINAL.

Before Justice Sir George Knox, Acting Chief Justice.

EMPEROR v. DUNYAPAT AND OTHERS *

Act no. XLV of 1860 (Indian Penal Code), section 379—Theft—Appropriation by tenants of fallen trees belonging to the zamindar.

1919
July, 16.

Certain trees, the property of the zamindar of the village in which they were situated, were blown down bodily by a dust-storm. Some of the tenants of the village thereupon removed and appropriated the trees. The zamindar laid a complaint against the tenants, charging them with theft. The tenants pleaded, but were unable to substantiate the plea, that they had a customary right to trees thus uprooted by a storm. *Held* that the action of the tenants in appropriating the trees *prima facie* amounted to the offence of theft; it lay on them to establish the title which they set up, and in the circumstances their conviction was right.

THIS was an application in revision against an order of the Additional Sessions Judge of Cawnpore upholding the conviction of the applicants on a charge of theft under section 379 of the Indian Penal Code. The facts of the case sufficiently appear from the judgment of the Court.

Maulvi *Iqbal Ahmad* (with him Maulvi *Mukhtar Ahmad*), for the applicants.

The officiating Assistant Government Advocate (*Babu Lalit Mohan Banerji*) for the Crown.

KNOX, A. C. J.:—A complaint was instituted by one Pandit Bawa Ram to the effect that on the 20th of June a dust-storm swept through the village of Mahotra with the result that nine *mahwa* and one mango tree were uprooted. In addition to these trees uprooted by this dust-storm there were two old *mahwa* trees which had fallen a year before and were lying on the ground. The accused, who are tenants in the village Mahotra, removed these uprooted trees and the two *mahwa* trees which had fallen the year previous and took possession of them. The tenants appeared and admitted having taken the trees and kept them within their possession. The courts below have found that the removal of these trees amounted to an offence of theft. It has been argued in revision in this Court that the act of the tenants was wanting in the element of dishonesty which is a necessary

*Criminal Revision no. 272 of 1919 from an order of Kalika Singh, Additional Sessions Judge of Cawnpore, dated the 27th of February, 1919.

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essential of every theft. The argument is that the zamindar has been attempting to enforce his rights without having recourse to the Civil Courts. The case, it is said, is for the Civil Courts and not for the Criminal Courts. The plea is raised that there is a custom in this village whereby tenants can, under such circumstances, remove trees, and an extract from the *wajib-ul-arz* of 1860 and an extract from the *wajib-ul-arz* of 1880 were read over to me as proving that the custom set up by the tenants exists and prevails in this village. I do not understand these extracts as in any way evidencing a custom authorizing tenants to remove without the consent of the zamindar whole trees which have been uprooted by dust-storms. But I am not going to lay down any finding as to whether such a custom does or does not exist in the village of Mahotra: that is a matter for the Civil Court. All I have to consider is whether it has been proved in this case that the tenants dishonestly removed certain trees. The courts below have found and the tenants have admitted that they did remove the trees. It was for them to prove that the removal was not dishonest. The removal certainly caused loss to the zamindar, which was wrongful loss to him, and caused wrongful gain to the accused. The accused caused this loss by means which at the time of employing those means they knew to be likely to cause it. It may well be that they had some intention, by this act, of creating evidence of a custom to remove the trees in their favour. As the evidence on the record stands, that loss was wrongful loss and the case falls within illustration (a) of section 378 of the Indian Penal Code. I was referred to the case of *Bhagwat Saran Misir v. Emperor* (1). There is no finding in this case that the accused was acting *bond fide*, on what he supposed to be his legal right.

The sentence of fine does seem to me to be severe. I reduce the fine to a fine of Rs. 320 or Rs. 40, on each one of the accused. Of this sum, if realized, Rs. 300 will be given to Pandit Bawa Ram, who appears *prima facie* entitled to the trees that were removed. In other respects the sentence passed by the court below will stand good.

Conviction maintained.

(1) (1916) 14 A.L.J., 399.