REVISIONAL CRIMINAL

Before Mr. Justice Bajpai

EMPEROR *v.* BALDEWA*

1933
August, 10

Indian Penal Code, section 441—Criminal trespass—Unlawful entry not necessarily an "offence"—"Intent" necessary—Knowledge of likelihood not sufficient—Unlawful entry followed by continuance of occupation in spite of remonstrances—Criminal Procedure Code, sections 200, 537—Failure to examine the complainant—Irregularity.

The "offence" mentioned in section 441 of the Indian Penal Code cannot be the offence of criminal trespass itself but must be some other offence either under the Indian Penal Code or under any special enactment.

Every unlawful act is not necessarily an offence, and mere entry without right upon another's land does not render the accompanying trespass a criminal trespass.

There is a distinction between the phrases "with intent" and "with knowledge"; it must be proved by the prosecution that the accused had the intention to intimidate, insult or annoy when he made the entry, and it is not enough that the prosecution should ask the court to infer that the entry is bound to cause intimidation, insult or annoyance. A mere knowledge that the trespass is likely to cause insult or annoyance does not amount to an intent to insult or annoy within section 441 of the Indian Penal Code.

An unlawful entry, in circumstances which do not prove the intention required by section 441, followed by unlawful continuance of occupation in circumstances which establish such an intention is punishable under that section, and there is nothing in the second paragraph of the section against this. So, where the accused started building a hut on a piece of land which was not obviously included within railway land, and the accused apparently acted under a *bona fide* claim of title and there was nothing to establish an intention to intimidate, insult or annoy; but later on it was demonstrated to him that the land was railway land, and he still continued to build in spite of repeated remonstrances and warnings, it was *held* that he was rightly convicted of the offence of criminal trespass.

Failure to examine the complainant on the back of the complaint under section 200 of the Criminal Procedure Code is a mere irregularity cured by section 537.

*Criminal Revision No. 435 of 1933, from an order of K. N. Wanchoo, Sessions Judge of Muzaffarnagar, dated the 3rd of January, 1933.

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Mr. *L. M. Roy*, for the applicant.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

BAJPAI, J.:—This is an application in revision by one Baldewa who has been convicted by the Bench Magistrates of Kandhla, district Muzaffarnagar, under section 447 of the Indian Penal Code, and sentenced to pay a fine of Rs.100. The Bench also passed certain orders regarding possession of the property on which trespass is said to have been committed. This conviction was affirmed in appeal by the learned Sessions and Subordinate Judge of Muzaffarnagar. In revision it has been argued before me that the trial is vitiated because the complainant was not examined under section 244 of the Criminal Procedure Code and the Magistrate was bound to do so. Next it is contended that "in the absence of any evidence that the entry in the land was with a view to intimidate or insult or annoy the railway authorities the conviction under section 447 of the Indian Penal Code is bad in law." The third ground is the common ground regarding the severity of sentence. No grievance has been made before me in connection with the order regarding possession of the property over which trespass has been said to be committed.

The facts are that there is a plot of land which has been recently let out to the S. S. L. Railway and the railway has put up certain boundary flags over the plot that has been leased out to the railway. The accused Baldewa started building a small house or hut on a portion of the land which has now been found to have been leased to the railway. It may be conceded in favour of the accused that it was not perhaps possible to the naked eye to find out the exact limits of the railway property, because it appears from the evidence of the station master that after Baldewa had trespassed upon this land the station master had to get an overseer to take measurements and then to point out to Baldewa

that the property on which he was building was the property of the railway. I may, therefore, assume that Baldewa entered upon this land under a *bona fide* claim of title, and as such I have got to see whether under the first clause of section 441 of the Indian Penal Code he entered upon such property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property. The offence contemplated in this provision cannot obviously be the offence of criminal trespass but must be some other offence either under the Indian Penal Code or under any special enactment. In view of the finding arrived at by the courts below that the property on which the entry was made belonged to and was in the possession of the railway I may further hold that Baldewa's act, although in assertion of a *bona fide* title, was an unlawful act, but every unlawful act is not necessarily an offence (*see* section 40 of the Indian Penal Code), and an intention to commit an unlawful act not being one of the acts mentioned in section 441 of the Indian Penal Code the mere entry does not render the accompanying trespass a criminal trespass. It was not suggested in the present case that any particular offence either under the Indian Penal Code or under any special enactment was within the contemplation of the accused. I have then got to see whether Baldewa entered upon this property with intent to intimidate, insult or annoy any person in possession of such property. It should be noticed that the legislature has used the words "with intent" and not the words "with knowledge". That there is a distinction between these two phrases is obvious from the fact that in certain other sections of the Indian Penal Code both expressions are used as meaning different sets of circumstances (*see* section 425 of the Indian Penal Code). It must, therefore, be proved by the prosecution that the accused had the intention to intimidate, insult or annoy when he made the entry; nor is it enough that the prosecution should ask the court

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to infer that the entry is bound to cause intimidation, insult or annoyance to the person in possession of the property. In *Emperor* v. *Moti Lal* (1) a Bench of this Court has held that "A conviction cannot in our opinion follow merely because one can pronounce with certainty that the accused must have known that his act would, as one of its inevitable incidents, cause annoyance." A Full Bench of the Madras High Court in *Vullappa* v. *Bheema Row* (2) has held that "A mere knowledge that the trespass is likely to cause insult or annoyance does not amount to an intent to insult or annoy within section 441 of the Indian Penal Code." "Trespass is an offence under section 441, Indian Penal Code, only if it is committed with one of the intents specified in the section, and proof that a trespass committed with some other object was known to the accused to be likely or certain to cause insult or annoyance is insufficient to sustain a conviction under section 448 of the Indian Penal Code." It is impossible, therefore, to hold in the present case that the accused Baldewa entered upon the railway property in possession of the railway with intent to commit an offence or to intimidate, insult or annoy the railway authorities in possession of such property, and the courts below do not seem to have drawn a clear distinction between "intention" and "knowledge of likelihood".

It has, however, been contended on behalf of the Crown that the accused can be convicted under the second clause of section 441 of the Indian Penal Code and that no prejudice has been caused to the accused inasmuch as he was fully aware as to what the charge against him was. He knew that it was not only because his initial entry was punishable that he was charged but he knew perfectly well that his continuance in possession was perhaps the chief reason why he was prosecuted. The prosecution case is that in spite of remonstrances, protests and warnings the accused

(1) (1925) I.L.R., 47 All., 855. (2) (1917) I.L.R., 41 Mad., 156.

continued to remain in possession of the property. The contention on behalf of the accused is that the second provision comes into play only when the entry of the accused in the first instance was lawful and the continuance in possession was unlawful with the intent mentioned in that provision. *Ex hypothesi* in the present case the entry itself was unlawful and therefore, it is submitted on behalf of the accused, the second provision of the section cannot be invoked in aid by the prosecution. A literal reading of the section might lend some support to this argument but a literal interpretation of the same would land us in an anomaly, because it would then mean that a lawful entry followed by unlawful continuance would be punishable, whereas unlawful entry followed by unlawful continuance in possession would not be punishable. A similar point arose in *King-Emperor* v. *Bandhu Singh* (1) and a Bench of the Patna High Court, MULLICK, A. C. J., with the concurrence of WORT, J., held as follows: "In my opinion section 441 of the Indian Penal Code substantially reproduces the English law. It provides that if the trespasser having entered lawfully remains unlawfully on the property with intent to annoy he will be said to commit criminal trespass. In my opinion no less punishable is an unlawful entry followed by an unlawful continuance of occupation. It may be said that the intruder or trespasser pays the penalty once for all upon conviction for the act of entry and that he cannot be again punished for continuance of occupation. I think the answer to this is that each time that the true owner goes upon the land or makes a claim under circumstances sufficient in law to constitute re-entry and the trespasser opposes him with the intention required by section 441 a new offence under that section is committed and a new liability arises."

It is not necessary for me for the purpose of the present case to go as far as the learned Judges went in

(1) (1927) I.L.R., 6 Pat., 794 (800).

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the Patna case and to hold that each time the true owner re-enters on the land and the trespasser opposes him with the intention required by section 411 a new offence under that section is committed, but I am of the opinion that this case strengthens me in the view which I have just enunciated, namely, that an unlawful entry followed by unlawful continuance of occupation is also punishable under section 441 of the Indian Penal Code. This being my view of the law, it follows that in the present case Baldewa has incurred the liability imposed by section 441 of the Indian Penal Code. He, when he was building on the land, was constantly told and constantly warned that he was trespassing on another man's property. He was even shown the measurements made by a competent person and his unlawful act was demonstrated almost to a certainty to him, but in spite of that he continued to build and threaten and abuse the railway authorities. His intention, therefore, in remaining on the land was to insult and annoy the railway people. My conclusion therefore is that he has been rightly convicted.

It was also argued, as I stated at the outset, that inasmuch as the complainant was not examined under section 244 of the Criminal Procedure Code the trial is vitiated. The phraseology of the ground is not correct because an examination of the record shows that Mr. Pearce, the complainant, was examined under section 244 of the Criminal Procedure Code. What really did happen was that the complainant was not examined on the back of the complaint under section 200 of the Criminal Procedure Code. This is a mere irregularity cured under section 537 of the Criminal Procedure Code because obviously the accused has in no way been prejudiced. I may refer to the cases of *Anil Krista Das* v. *Badam Santra* (1) and *Emperor* v. *Heman Gope* (2).

The result is that I dismiss this revision.

(1) A.I.R., 1929 Cal., 175. (2) (1920) 58 Indian Cases, 459.