

REVISIONAL CRIMINAL.

Before Mr. Justice A. G. P. Pullan.

1930
February,
27.

KING-EMPEROR (COMPLAINANT) v. MADHO AND OTHERS
(ACCUSED.)*

Cattle Trespass Act (I of 1871), sections 24 and 11—Offence under section 24 Cattle Trespass Act essential elements of—Indian Railways Act (IX of 1890), section 125(2)—Crossing the railway line, when an offence.

Held that in order that an offence under section 24 of the Cattle Trespass Act be established the seizure of the cattle must be legal, that is to say, the animals must be liable to seizure under section 11 of the same Act. Section 11 authorises persons in charge of public roads, which under the provisions of section 125(4) of the Indian Railways Act includes railways, to seize any cattle doing damage or straying. Cattle which have been driven across a railway line by their owner cannot be said to have strayed and damage must be proved. *Sukhnandan Rai v. Emperor* (1), *Dassi Goala v. Sardar Mahton* (2), and *Manik Chandra Roy v. Kalu* (3), relied on.

Section 125(2) of the Indian Railways Act applies if cattle are wilfully driven on any railway otherwise than for the purpose of lawfully crossing the railway. There is no provision under the Indian Railways Act by which the public is forbidden to cross railway lines or drive animals across them at places other than level-crossings and if the railway erects no fence they cannot prevent persons crossing the railway line at will.

Where, therefore, certain persons were driving some head of cattle across the railway line at a place where there was no fence and where there was a regular track and they were stopped by a railway employee who tried to seize the animals with a view to taking them to the pound but they forcibly opposed the seizure and it was neither alleged nor proved that the cattle did any damage, the cattle were not liable to be seized and no penalty could be imposed under the Cattle Trespass Act upon the owners for forcibly opposing the seizure nor could they be convicted under section 125(2) of the Indian Railways Act for it cannot be said that their purpose in crossing the railway was not lawful.

* Criminal Reference No. 6 of 1930.

(1) (1919) 19 Cr., L.J.R., 157 (2) (1920) 21 Cr., L.J.R., 640.
(3) (1919) 20 Cr., L.J.R., 398.

The Assistant Government Advocate (Mr. H. K. Ghose), for the Crown.

Mr. *Bhagwati Nath Srivastava*, for the accused.

PULLAN, J. :—Four persons have been convicted of an offence under section 24 of the Cattle Trespass Act (I of 1871) and section 125, clause (2) of the Indian Railways Act in a summary trial and fined Rs. 100 each under the former section and Rs. 20 each under the latter. The case has been referred to this Court by the learned Additional Sessions Judge of Bahraich on the ground that the conviction under section 24 of the Cattle Trespass Act is illegal, but the learned Judge is of opinion that the conviction and sentence under section 125(2) of the Indian Railways Act can be maintained. I am not concerned with any injuries that may have been inflicted in this case on the person of any railway servant as no charge was framed under any sections except those to which I have referred, and I have merely to consider whether the evidence in this case justifies a finding that these persons were guilty either of an offence under section 24 of the Cattle Trespass Act or of an offence under section 125(2) of the Indian Railways Act. The four persons were driving ten head of cattle across the railway line at a place where there was no fence and where, according to the Magistrate, there was a regular track. They were stopped by a railway employee who tried to seize the animals with a view to taking them to the pound, and they forcibly opposed the seizure. In order that an offence may be established under section 24 of the Cattle Trespass Act the seizure of the cattle must have been legal, that is to say, the animals must have been liable to seizure under section 11 of the same Act. Section 11 authorises persons in charge of public roads which under the provisions of section 125(4) of the Indian Railways Act includes railways, to seize any cattle doing damage or straying. Cattle which been driven across a railway line by their owner cannot be said to have strayed

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and damage must be proved. In this case it was not even alleged that the cattle were doing any damage, and it is not easy to say what damage could have been caused by them while they were merely being driven over the line. The Magistrate in his explanation says that when he inspected the locality on September 24th, 1929, that is to say eight weeks after the alleged offence, he found that some ballast *kankar* had been scattered, an earthen embankment had been fissured and worn out and some grass nibbled but he does not profess to believe that this damage was caused only by the cattle in the present case, and such a view would be untenable in face of his own judgment where he says that a regular track had been worn across the land at this place. I must therefore find that the cattle caused no damage and this being so they were not in my opinion liable to seizure. Whether the railway employees could or could not order the owners of the cattle to remove them and refuse them a right of passage need not be considered. Section 24 refers only to those who forcibly oppose the seizure of cattle liable to be seized. In my opinion the cattle were not liable to be seized and no penalty can be imposed under the Cattle Trespass Act upon the owners for forcibly opposing the seizure. I have already stated that no charge was preferred against them under the Indian Penal Code for causing hurt or assault and I find therefore that the reference as to the conviction and sentence under section 24 of the Cattle Trespass Act should be accepted. I am not referred to any ruling of this Court on this point but there are two rulings of the Patna High Court reported in Criminal Law Journal Reports both of which insist on the fact that damage must be proved before a conviction under section 24 of the Cattle Trespass Act can be sustained. See *Sukhnandan Rai v. Emperor* (1), and *Dassi Goala v. Sardar Mahton* (2). The same view was held by the Calcutta High Court in *Manik Chandra Roy v. Ismail Kalu* (3).

(1) (1919) 19 Cr. L.J.R., 157.

(2) (1920) 21 Cr. L.J.R., 640.

(3) (1919) 20 Cr. L.J.R., 398.

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I would however go further than the learned Judge and find that the conviction under section 125(2) of the Indian Railways Act is also unsustainable. That section applies if cattle were wilfully driven on any railway otherwise than for the purpose of lawfully crossing the railway. In order that these persons should be convicted under that section it must be proved that their purpose was not lawful. Now there is no provision in the Indian Railways Act by which the public is forbidden to cross railway lines or drive animals across them at places other than level-crossings and if the railway erects no fence the public will continue to cross the line and drive their animals across it until they are stopped. I find no section in the Act under which the public can be stopped. It is not obligatory on Railway Companies to provide fences unless they are directed to do so by the Governor General in Council; but where they do not choose to erect fences they cannot in my opinion prevent persons crossing the railway line at will. They have their remedy where the cattle are found to commit damage or to stray without owners on the railway ground but the mere crossing of the railway is not unlawful. Thus on general grounds I am of opinion that the conviction under section 125(2) should be set aside. There is also a special ground for so doing. The section lays down that the fine may extend to Rs. 10 for each head of cattle to be recovered from the owner. There is no finding in this case as to the number of cattle owned by each of the accused. An arbitrary fine of Rs. 20 each should not have been inflicted. It is true that this may be considered to be a more or less trivial point but it is an additional reason for interfering in a case where the conviction is not justified by the law under which the Magistrate purported to act. I therefore accept this reference as to the conviction under section 24 of the Cattle Trespass Act and I also accept the request made on behalf of the accused as to their conviction under section 125(2) of

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the Indian Railways Act, and I order that both the sentences and convictions be quashed and the fine, if paid, be refunded.

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Before Mr. Justice E. M. Nanavutty.

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March, 20.

BURHMA (ACCUSED-APPLICANT) v. KING-EMPEROR
(COMPLAINANT-OPPOSITE PARTY)*

Indian Penal Code (Act XLV of 1860), section 366—Kidnapping a minor girl when she was away from her lawful guardian, whether an offence under section 366, Indian Penal Code.

Where the accused found a minor girl at the house of another person away from the lawful guardianship of her mother and was taking her away in the company of others to another place when he was arrested *held*, that he must have known when he took away the girl that she had a lawful guardian from whose custody he was taking her away and so he, in taking away the girl in order to sell her and to pocket the sale proceeds, was guilty of an offence under section 366 of Indian Penal Code. *King-Emperor v. Gokaran (1), Nema Chatteraj v. Q. E. (2), Emperor v. Abdul Rahman (3), Nanak Sahu v. King-Emperor (4), and Idu v. King-Emperor (5)*, referred to.

Mr. *Moti Lal Saksena*, for the applicant.

The Government Advocate (Mr. *H. K. Ghosh*), for the Crown.

NANAVUTTY, J.:—This is an application for revision of an appellate order of the learned Sessions Judge of Fyzabad upholding the conviction and sentence passed upon the applicant Burhma of an offence under section 366 of the Indian Penal Code. The story of the prose-

*Criminal Revision No. 16 of 1930, against the order of R. L. Yorke, District and Sessions Judge of Fyzabad, dated the 16th of January, 1930, confirming the order of Pandit Krishna Nand Fande, Assistant Sessions Judge of Sultanpur, dated the 28th of October, 1929.

(1) (1920) 24 O.C., 329.

(2) (1900) I.L.R., 27 Cal., 1041.

(3) (1916) I.L.R., 38 All., 664.

(4) (1926) I.L.R., 5 Pat., 536.

(5) (1923) 27 O.C., 32.