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APPELLATE CRIMINAL

Before Mr. Justice E. M. Nanavutty

PAHALWAN SINGH (APPELLANT) *v.* KING-EMPEROR (COMPLAINANT-RESPONDENT)* 1934 March 5

Indian Penal Code (Act XLV of 1860), section 425—"Mischief"—Essential ingredients of offence of mischief—Cutting of ripe crop, whether mischief—Criminal Procedure Code (Act V of 1898), section 288—Statements of witnesses recorded before Committing Magistrate, admissibility in Sessions trial—Evidential value of such statements—Conviction made on statement before Committing Magistrate, legality of.

The essential ingredient of the offence of mischief as defined in section 425 of the Indian Penal Code is the causing of destruction of any property or any such change in any property or in the situation thereof as destroys or diminishes its value or utility or affects it injuriously. To cut ripe crops which are grown to be cut is not to destroy them or affect them injuriously and is therefore no mischief. *Muhammad Foyaz* v. *Khan Mahomed* (1), *In re Miras Chaukidar* (2), *Sardar Singh* v. *King-Emperor* (3), *Shakur Mohammad* v. *Chandra Mohan Shah* (4), and *Raghopatty Iyer* v. *Naraina Goundan* (5), referred to and discussed.

The depositions of witnesses recorded by the Committing Magistrate, may, at the discretion of the presiding Judge, be read as substantive evidence in the Sessions trial, but section 288 of the Code of Criminal Procedure does not prescribe the value or weight to be attached to such evidence when it is admitted by the Court of Session at the trial of the case. Where, therefore, some prosecution witnesses made different statements before the trying Magistrate and before the Court of Session and there is nothing

*Criminal Appeal No. 523 of 1933, against the order of Pandit Tika Ram Misra, Sessions Judge of Unao, dated the 4th of October, 1933.

(1) (1872) 18 Suth., W.R.Cr., 10. (2) (1903) 7 C.W.N., 713.
(3) (1917) 44 I.C., 451. (4) 21 Suth., W.R.Cr., 58.
(5) (1929) A.I.R., Mad., 5.

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to show that they have become hostile or have been won over by the accused, then before the conviction of the accused on the basis of such previous statements of these witnesses can be legally supported, there must be independent corroboration of the truth of the statements made by these witnesses before the Committing Magistrate, and there must be sufficient reasons for preferring the evidence of these witnesses made before the Magistrate to the evidence of these same witnesses made before the Court of Session.

Dr. *J. N. Misra*, for the appellant.

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

NANAVUTTY, J.:—This is an appeal from a judgment of the learned Sessions Judge of Unao convicting the appellant Pahlwan Singh of an offence under section 325 of the Indian Penal Code, read with section 114 of the Indian Penal Code, and sentencing him to undergo three years' rigorous imprisonment, and further convicting him also of an offence under section 440 of the Indian Penal Code, and sentencing him to two years' rigorous imprisonment, the two sentences running concurrently.

The story of the prosecution is briefly as follows:

The deceased Umrai and his son Tote were tenants of Raj Bahadur Singh cultivating land in village Roshanabad. As the rent of Umrai's holding was in arrears, Raj Bahadur Singh had distrained the crops of Umrai as well as of certain other tenants whose rents also were in arrears. The accused Uma Ahir had been put in charge of the crops of Umrai, which had been distrained, as *supardar*. Notwithstanding the distraint, Umrai and Tote began to reap their crops on the afternoon of the 17th of March, 1933, at about a *pahar* before sunset, that is, about 3-30 p.m. The zamindar Raj Bahadur Singh and others, namely, Uma, Sadanand, Gokul and Pahlwan, asked Umrai and his son Tote to stop cutting their crop as they had ben distrained by the zamindar. Umrai and Tote insisted upon cutting their crops and thereupon Raj Bahadur Singh told Uma and

the others present to beat Umrai and Tote. A *lathi* fight ensued in which Uma and Tote both received injuries. Kesho, Tiloki and Tika intervened and then the fight came to an end. A report of this occurrence was made by Tote at police station Bangarmau the next day at 3 p.m., that is, on the 18th of March, 1933. This report was entered in the general police diary as relating to a non-cognizable offence, and the complainant was told to seek his redress through the criminal courts. Umrai died on the 19th of March, 1933, at about midday in his own house. Information of his death was conveyed to police station Bangarmau and thereupon a crime under section 304 of the Indian Penal Code was registered and investigation was started by the police. An inquest report was prepared and the corpse of Umrai was sent to Sadar for *post-mortem* examination, and after completing his investigation Sub-Inspector Fida Husain prosecuted Gokul, Sadanand, Uma and Pahlwan of an offence under section 304 of the Indian Penal Code and these accused were committed by K. S. Maulvi Farid-ud-din Ahmad to stand their trial on the said charge in the Court of Session. The learned Sessions Judge framed an additional charge under section 440 of the Indian Penal Code against all the four accused. He acquitted Gokul of both the offences under sections 304 and 440 of the Indian Penal Code, but, while acquitting Uma and Sadanand of an offence under section 304 of the Indian Penal Code, he convicted them of an offence under section 325 of the Indian Penal Code and he convicted Pahlwan Singh of an offence under section 325 of the Indian Penal Code read with section 114 of the Indian Penal Code. He also convicted Pahlwan Singh of an offence under section 440 of the Indian Penal Code but he acquitted Uma, Sadanand and Gokul of the offence under section 440 of the Indian Penal Code.

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The eye-witnesses of the occurrence examined in the Court of Session are P. W. 4 Tote, P. W. 11

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Tiloki Kachhi, P. W. 12 Tika Kachhi, P. W. 13 Nanhu Chamar and P. W. 14 Debi Din Kachhi. The evidence of Tiloki, Tika, Nanhu and Debi Din recorded by the learned Sessions Judge does not go to prove the guilt of the appellant Pahlwan Singh in respect of the charges brought against him. The learned Sessions Judge has, at the end of his judgment, made a note to the effect that after the result of the appeal is known the file of this case should be put up before him to take action against these four witnesses on a charge of perjury under section 193 of the Indian Penal Code. In other words he is of opinion that the evidence given in his court by these four witnesses Tiloki, Tika, Nanhu and Debi Din is false and not worthy of belief. He has therefore relied upon the evidence of these witnesses recorded by the Committing Magistrate and the record of those depositions has been brought on the Sessions File under section 288 of the Code of Criminal Procedure. It is true that the depositions of these witnesses, recorded by the Committing Magistrate, may, at the discretion of the presiding Judge, be read as substantive evidence in the Sessions trial, but section 288 of the Code of Criminal Procedure does not prescribe the value or weight to be attached to such evidence when it is admitted by the Court of Session at the trial of the case. I may note that there is no request by the Government Pleader on behalf of the Crown in the trial court to have the evidence of the witnesses given before the Magistrate brought on the Sessions File, nor is there any allegation by the Government Pleader who appeared for the Crown that these prosecution witnesses had been won over by the accused and had therefore become hostile. There is nothing on the record to show that these witnesses have in fact become hostile or have been won over by the accused, and before the conviction of the accused on the basis of such previous statements of these witnesses can be legally supported, there must be independent corroboration of

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the truth of the statements made by these witnesses before the Committing Magistrate, and there must be sufficient reasons for preferring the evidence of these witnesses made before the Magistrate to the evidence of these same witnesses made before the Court of Session. At best, these witnesses by giving contrary evidence in the two courts, have effectually destroyed the value of their own testimony, and upon the materials on the record I am not in a position to say whether these witnesses were speaking the truth before the Committing Magistrate or before the Court of Session. For aught I know to the contrary their statements in both courts may not be true.

There remains then the sole testimony of P. W. 4. Tote, the son of the deceased. The evidence given by this witness is at direct variance with the report made by him at police station Bangarmau on the day after the occurrence. I see no reason to mistrust the truth of the first information report (Exhibit 2), made by Tote at a time when he had no reason to implicate falsely anybody. In that report Tote had stated that it was Raj Bahadur, his zamindar, who had given the order to Uma and the others to beat him and his father Umrai. For some reason, best known to Tote, he has now altered his story and has denied the presence of Raj Bahadur on the spot, and has assigned to the appellant Pahlwan Singh the role which he had given to Raj Bahadur in his first information report. Practically every word of the first information report is now denied by Tote in the Court of Session. He begins by saying that he did not dictate this report at all. He denies that he mentioned Gokul's name. He denies the presence of Raj Bahadur when the assault was made on him and his father. He denies that his crops were distrained, when in fact he has clearly stated in his first report that the crops of all the tenants had been distrained and even

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appraisement of crops had taken place but not of his crop. The words in the report are:

"sab ki agenti lagain aur kut bhi ho gai thi, main ne kut nahin karai."

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He denies the presence of Kesho, Tilok and Tika at the time of the occurrence and now deposes in the Court of Session that no one intervened and that Kesho, Tilok and Tika did not intervene in the quarrel. He admits in his cross-examination that he as well as his father Umrai were prosecuted for *badmashi* under section 110 of the Code of Criminal Procedure and were bound over to be of good behaviour for one year. He further admits that the appellant Pahlwan Singh was one of the witnesses against him and his father in those proceedings under section 110 of the Code. A perusal of the deposition of this witness Tote recorded by the learned Sessions Judge shows that he has lied at every turn, and is a thoroughly untrustworthy and unreliable witness, and it would not be safe, so far as the appellant is concerned, to base his conviction upon the testimony of this witness. Tote himself deposes that Pahlwan did not actually beat his father, but merely instigated the others to beat him. This statement of Tote is not supported by the first information report made by him at police station Bangarmau. In that report Tote stated that Pahlwan beat him and he makes no mention as to who beat his father Umrai. Even in the deposition of Tiloki recorded under section 164 of the Code of Criminal Procedure there is no mention of Pahlwan Singh having given the order for beating Umrai and Tote.

I therefore hold that the charge under section 325 of the Indian Penal Code, read with section 114 of the Indian Penal Code, is not proved against the appellant Pahlwan Singh upon the evidence of Tote. Pahlwan Singh is therefore entitled to an acquittal on the charge under sections 325/114 of the Indian Penal Code.

I come next to discuss the case under section 440 of the Indian Penal Code against the appellant. This charge was framed by the learned Sessions Judge at the commencement of the Sessions trial. Section 440 of the Indian Penal Code runs as follows:

> "Whoever commits mischief having made preparation for causing to any person death or hurt or wrongful restraint or fear of death or of hurt or of wrongful restraint shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine."

The esstential ingredient of the offence of mischief as defined in section 425 of the Indian Penal Code is the causing of destruction of any property or any such change in any property or in the situation thereof as destroys or diminishes its value or utility or affects it injuriously. In the present case it is proved from the evidence of all the prosecution witnesses as well as from the first information report made by the son of the deceased Umrai a day after the occurrence that the crops of the field of Umrai which were cut were ripe crops. To cut ripe crops which are grown to be cut is not to destroy them or affect them injuriously. See *Muhammad Foyaz* v. *Khan Mahomed* (1) and *In re Miras Chaukidar* (2).

In *Mohammad Foyaz* v. *Khan Mahomed* (1), above cited, the Magistrate of Tipperah made the reference to the High Court in the following terms:

> "It is the essence of the offence of mischief that the perpetrator must cause 'the destruction of property or such change in it or in its situation as destroys or diminishes its value or utility or affects it injuriously.' To cut a crop that is grown to be cut is not to destroy it or affect it in the manner defined above. The taking may cause wrongful

(1) (1872) 18 Suth. W.R. Cr., 10. (2) (1903) 7 C.W.N., 713.

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loss to the grower, and if it be dishonest, a conviction may be had for the theft. But it cannot be mischief."

Again in the matter of *Miras Chaukidar* (1), RAMPINI and HANDLEY, JJ., delivered themselves of the following pronouncement:

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> "Taking these facts as found it appears to us that the accused could not be convicted of mischief, because he did not cause the deterioration of any property or any such change in any property or in the situation thereof as diminished its value or utility. Of course if the paddy had been unripe and not fit to be cut, he might have been convicted of mischief; but it is not found in this case that the paddy was not in a fit state to be cut. The applicant cannot therefore be convicted of mischief."

In the present case it has been found upon the evidence on the record that the crops cut by the zamindar's party were ripe crops in the field of the deceased Umrai. In *Sardar Singh* v. *King-Emperor* (2), it was held that the cutting down of a branch of a tree did not amount to mischief unless it destroyed or diminished the utility or value of the tree, and that where there was a dispute between two parties as to the ownership of a tree the branch of which had been cut down by one party the case was beyond the cognizance of a criminal court and outside the scope of section 425 of the Indian Penal Code. In *Shakur Mohammad* v. *Chandra Mohan Shah* (3), it was held that in a case in which the accused was charged with having cut and carried away bamboos, the right to which was disputed, that he could not be convicted of mischief under section 426 of the Indian Penal Code. In that case the learned Sessions Judge who made the

(1) (1903) 7 C.W.N., 713. (2) (1917) 44 I.C., 451.
(3) 21 Suth., W.R.Cr., 38.

reference to the Calcutta High Court observed as follows:

> "The essence of the offence of mischief is that the offender must cause the destruction of property or such change in it or in its situation 'as destroys or diminishes its value or utility, or affects it injuriously.' Now, as bamboo is a thing which is grown to be cut, the cutting and removing it does not amount to its destruction or other injury defined above. If there be any dishonest intention, the act of the offender in causing a wrongful loss to the complainant would amount to theft and not mischief."

In *T. S. Raghopatty Iyer* v. *Naraina Goundan and others* (1), it was held that the expression "destruction of any property or such change in any property or in the situation thereof as destroys or diminishes its value or utility or affects it injuriously", as contained in section 425 of the Indian Penal Code, carried the implication that something should be done contrary to its natural use and serviceableness, and that where graziers by allowing their goats to graze did do no more than put the grass to its normal use their act would not amount to mischief.

It is thus clear from the terms of the definition of mischief given in section 425 of the Indian Penal Code as well as from the rulings cited above, that the appellant Pahlwan Singh cannot be convicted of an offence under section 440 of the Indian Penal Code for allowing the zamindar Raj Bahadur and his labourers to cut the ripened crops of the field of the deceased Umrai. The conviction of the appellant Pahlwan Singh for an offence under section 440 of the Indian Penal Code therefore also cannot be sustained.

For the reasons given above I allow this appeal, set aside the convictions and sentences passed upon the

(1) (1929) A.I.R., Mad., 5.

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appellant, acquit him of the offences charged and order his immediate release.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice E. M. Nanavutty

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PANDIT RAM LOCHAN PRASAD (DEFENDANT-APPELLANT) *v.* MUSAMMAT RAM RAJI (PLAINTIFF-RESPONDENT)*

Transfer of Property Act (IV of 1882), sections 58 and 98—Simple mortgage—Anomalous mortgage—Express provision of power of sale, whether necessary in simple mortgage—Personal covenant, whether carries a power of sale—Mortgagee authorised to take possession in case of default—Power of sale, whether taken away—Mortgage, whether simple or anomalous.

It is not necessary for a simple mortgage that there should be an express provision giving the mortgagee a power of sale. Where a mortgage-deed shows clearly that it contains a personal covenant under which the mortgagor undertook to pay the mortgage money on the due date, the personal covenant carries with it, by necessary implication, a power of sale. The fact that the mortgage-deed authorises the mortgagee in case of default to enter into possession of the mortgaged property, cannot take away the power of sale implicit in the personal covenant more particularly when it has been found that the mortgagor failed to put the mortgagee in possession. Such a mortgage is a simple mortgage and is not an anomalous mortgage within the terms of section 98 of the Transfer of Property Act and a decree for sale passed on its basis is correct. *Lingam Krishna Bhupati Devu* v. *The Maharaja of Vizianagram* (1), *Lalta Prasad* v. *Hori Lal* (2), and *Lingam Krishna Bhupati Devu Garu* v. *Sri Mirza Sri Pusapati Vijayarama Gajapatiraj Maharaja Manya Sultan Bahadur* (3), relied on. *Lal Narsingh Partab* v. *Yaqub Khan* (4), distinguished.

Messrs. *M. H. Kidwai* and *S. C. Dass*, for the appellant.

*Second Civil Appeal No. 300 of 1932, against the decree of Pandit Shyam Manohar Nath Shargha, District Judge of Gonda, dated the 17th of August, 1932, confirming the decree of M. Mahmud Hasan Khan, Subordinate Judge of Gonda, dated the 13th of July, 1932.

(1) (1911) 8 A.L.J., 594.
(2) (1912) O.C., 90.
(3) (1911) 15 C.W.N., 441.
(4) (1929) I.L.R., 4 Luck., 533