

to me that in making these enquiries behind Muhammad Afzal's back the umpire was clearly guilty of misconduct, whether he recorded evidence or not, as in my opinion such an *ex-parte* enquiry should not have been made. It is impossible to determine what impression this *ex-parte* enquiry made on the mind of the umpire and how far it affected his ultimate decision. I would therefore dismiss this appeal with costs.

SIR SHADI LAL C. J.—I concur.

SHADI LAL C.J.

A. N. C.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Fforde and Mr. Justice Addison.

THE CROWN—Appellant

versus

BHOLA (ACCUSED) Respondent

Criminal Appeal No. 875 of 1926.

Indian Penal Code, 1860, sections 441, 447—Criminal trespass—Forcibly rescuing cattle from the pound—and intimidating the Chaukidar.

One N. lawfully seized a cow belonging to the accused and had it impounded in the cattle-pound. The accused, the owner of the cow, proceeded to the cattle-pound, opened the lock, entered and drove off the cow after slightly injuring the *Chaukidar* who attempted to prevent him.

Held, that the accused was guilty of the offence of criminal trespass, as defined in section 441 of the Indian Penal Code, as his act amounted to an entry upon property in the possession of another person with intent (1) to commit an offence (*i.e.*, an act which is made an offence by the Cattle Trespass Act) and (2) to intimidate the *Chaukidar* in charge of the premises, and was therefore punishable under section 447.

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ABDUL HAMID

v.

MUHAMMAD
AFZAL.

BROADWAY J.

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THE CROWN
v.
BHOLA.

Appeal from the order of Rai Bahadur Lala Sri Ram, Poplai, Sessions Judge, Karnal, dated the 8th May 1926, reversing that of Hakim Fazal Hussain, Magistrate, 1st class, Rohtak, dated the 6th April 1926, and acquitting the respondent.

CARDEN-NOAD, Government Advocate, for Appellant.

RAJ KRISHEN BAL, for Respondent.

JUDGMENT.

FFORDE J.

FFORDE J.—The respondent was tried under section 458 of the Indian Penal Code by a Magistrate invested with first class powers for having committed lurking house-trespass or house-breaking by night after having made preparations for causing hurt, and was convicted and sentenced to six months' rigorous imprisonment with a fine of Rs. 50, and, in default of payment of the fine to further rigorous imprisonment for three months. On appeal to the Sessions Judge this conviction and sentence were set aside, the learned Sessions Judge held that no offence had been established under the provisions of section 458 of the Indian Penal Code, and further held that the only penal provision under which the accused could be proceeded against was section 24 of the Cattle Trespass Act. He also expressed his opinion that proceedings under section 24 would not lie as the prosecution had not shown that the cattle seized had caused any damage within the meaning of that Act. The learned Sessions Judge upon these findings accepted the appeal of the accused and acquitted him. The Crown have now appealed to this Court against that judgment of acquittal.

The learned Government Advocate has quite rightly conceded at once, that section 458 of the

Indian Penal Code could not apply to the facts of this case. The facts found by the trial Magistrate are that on the night of the 23rd, or early morning of the 24th, of January 1926, one Nihala seized a cow belonging to the accused which he found grazing in his wheat crop and had it impounded in the cattle-pound of Mokhra, obtaining a receipt from the keeper of the pound. On the same night or early morning the accused proceeded to the cattle-pound, opened the lock, entered and drove off his cow, after slightly injuring the *chaukidar* who attempted to prevent him. The learned Government Advocate contends that this act of the accused amounted to the offence of criminal trespass within the meaning of section 447 of the Indian Penal Code, read with the definition given in Section 441. He says that the accused's act amounted to an entry upon property in the possession of another person with intent (1) to commit an offence and (2) to intimidate the person who was lawfully in charge of those premises. Section 40 provides that in Chapter IV and certain specified sections, the word "offence" denotes an offence punishable under the Indian Penal Code or under any special or local law as in section 40 defined; and, further, that under certain other sections, including section 441, the word "offence" has the above meaning when the thing punishable under the special or local law is punishable under such law with a penalty amounting to six months' imprisonment or upwards, whether with or without fine. The Government Advocate contends that an offence within the meaning of the latter part of section 40 has been committed under the provisions of section 24 of the Cattle Trespass Act, and that, accordingly, as the accused entered upon property in possession of another with intent to commit an act

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which is made an offence by the Cattle Trespass Act, he is guilty of criminal trespass within the meaning of section 447. The Government Advocate also contends that the accused in entering the pound did so with intent to intimidate the person in charge of the pound, did in fact intimidate him, and thereby committed an offence under section 447.

I think that upon the facts of this case both the learned Government Advocate's contentions are sound. There is no doubt that the accused did enter the pound, that he did it to intimidate the *Chaukidar* in charge of that pound, and that he also did it for the purpose of removing his cow which had been properly seized within the meaning of the provisions of the Cattle Trespass Act. I have not the slightest doubt that the accused's cow was grazing in the wheat crop of Nihala, and, therefore, Nihala was authorised under section 10 of the Cattle Trespass Act to impound it. For these reasons I am of opinion that the accused should have been convicted under section 447 of the Indian Penal Code, but not under section 458. I would accordingly accept this appeal, set aside the order of acquittal of the learned Sessions Judge and would convict him under section 447 of the Indian Penal Code and sentence him to a fine of Rs. 50 with one month's rigorous imprisonment in default of payment, in substitution for the conviction under section 458 had by the trial Magistrate and for the punishment awarded by him.

ADDISON J.

ADDISON J.—I concur.

A. N. C.

Appeal accepted.