CRIMINAL REFERENCE.

Before Mr. Justice Candy and Mr. Justice Crowe.

CAWASJI MERWANJI SHROFF (COMPLAINANT) *v.* THE GREAT INDIAN PENINSULA RAILWAY COMPANY (ACCUSED).*

1902. *April* 14.

Animals—Cruelty to animals—Prevention of Cruelty to Animals Act (Act XI of 1890), section 3—Police Bombay Town (Act XLVIII of 1860), section 21—Railway Company—Master and servant—Criminal liability of master for his servant's acts—Goods yard of a railway—Public place.

The G. I. P. Railway Company carried twenty-seven head of cattle from Talegaon to Bombay. These cattle were put in one truck by their owner under the supervision of the Company's goods clerk at Talegaon, and were so allowed to be put by the Company's servants at Talegaon in spite of a circular issued to them by the Traffic Manager to prevent the overcrowding of cattle. When the cattle were detrained at the goods yard of the Company at Wadi Bundar, they were found suffering from the effects of overcrowding. The Bombay Society for the Prevention of Cruelty to Animals prosecuted the Railway Company under section 21 of Act XLVIII of 1860 and section 3 (*b*) of the Act for the Prevention of Cruelty to Animals (Act XI of 1890). The Presidency Magistrate, who tried the case, referred to the High Court the following two questions:

(1) Is the Company liable, under the above circumstances, for the acts of the owner of the cattle and the goods clerk at Talegaon under section 3 (*b*) of Act XI of 1890, though they may have no knowledge as to how the animals were carried?

(2) Is the Wadi Bundar goods station a place accessible to the public, when the Company's orders are that men on business alone should be admitted there?

The High Court answered the first question in the negative and the second in the affirmative.

Act XI of 1890 is aimed at the individual who actually practises the cruelty, and it was not intended by the Legislature to make a master penally liable for the act of his servant done in the course of the servant's employment, and certainly not when the act is done contrary to the orders of the master.

REFERENCE made by P. H. Dastur, Second Presidency Magistrate of Bombay, under section 432 of the Criminal Procedure Code (Act V of 1898).

The following were the facts as set forth in the judgment of the Magistrate:

On the 31st January, 1902, the complainant Cawasji Merwanji

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Shroff, the Secretary and Treasurer to the Society for the Prevention of Cruelty to Animals, saw at the Wadi Bundar goods station of the Great Indian Peninsula Railway a wagon laden with twenty-seven cattle, which had been carried in that truck all the way from Talegaon to Bombay. The cattle were packed tightly together: one was found lying down on the floor, unable to rise on its legs, and was being trampled upon by the other cattle. It appeared that the cattle, when detrained, were found to be suffering considerably, and were so dazed, weak and emaciated as to walk with difficulty.

These cattle had been put into the truck at Talegaon by their owner in the presence and under the permission of the goods clerk at the Talegaon railway station.

The Company's servants at Talegaon allowed the twenty-seven cattle to be put into one truck, in spite of the following circular issued by the Company to its servants on the 29th October, 1901:

A complaint having been received that merchants despatching cattle at the wagon rate are in the habit of overcrowding the animals to such an extent as to amount to cruelty, station masters are instructed that this must not be permitted, and further, any station master *en route* who may see cattle loaded in a wagon in such numbers as to cause him to believe that the cattle are suffering therefrom, must report the matter to the District Traffic Superintendent in whose district the loading station is situated, giving the stations from and to which the cattle were being carried and the number of cattle in the truck. Should a station master be found to be permitting overcrowding which will amount to cruelty, he will be dealt with.

The complainant charged the Railway Company under section 21 of the Police Act (XLVIII of 1860) with cruelty to the said cattle and with causing and procuring the said cattle to be cruelly ill-treated and abused, and also under section 3, clause (*b*), of Act XI of 1890 with carrying the said cattle in such a manner and position as to subject them to unnecessary pain and suffering.[1]

(1) The following are the sections:

Act XI of 1890, section 3.

If any person in any street or in any other place, whether open or closed, to which the public have access, or within sight of any person in any street or in any such other place (*a*) cruelly and unnecessarily beats, overdrives, overloads or otherwise ill-

The Presidency Magistrate found it proved that the cattle were carried in such a manner as to amount to cruelty; but referred the following two questions for the decision of the High Court:

1. Is the Company liable, under the circumstances narrated in the judgment, for the acts of the owner of the cattle and of the goods clerk at Talegaon station, under section 3 (*b*) of Act XI of 1890, though the Company may have had no knowledge as to how the animals were carried?

2. Is Wadi Bundar goods station a place accessible to the public, within the meaning of section 3 of Act XI of 1890, when the Company's orders are that men on business alone should be admitted there?

Branson and *Jinnah*, with *Little & Co.*, for the Railway Company:—An accused person cannot be criminally punished unless the *mens rea* is proved; nor can he be found guilty of a crime committed by his servant: *Elliot* v. *Osborne* (1); *Swan* v. *Sanders* (2); *Brown* v. *Foot* (3); *Massey* v. *Morriss* (4); *Derbyshire* v. *Houliston* (5); *Coppen* v. *Moore* (No. 2)(6); *Chisholm* v. *Doulton* (7); *Chundi Churn* v. *Empress*.(8) A Railway Company cannot, therefore, be penally liable for the acts of its servants; and the first question ought, therefore, to be answered in favour of the Railway Company.

As to the second question, we submit that the Company's goods yard at Wadi Bundar is a public place: *Langrish* v. *Archer* (9); *Case* v. *Storey*.(10)

treats any animals, or (*b*) binds or carries any animal in such a manner or position as to subject the animal to unnecessary pain or suffering, or (*c*) offers, exposes or has in his possession for sale any live animal which is suffering pain by reason of mutilation, starvation or other ill-treatment, or any dead animal which he has reason to believe to have been killed in an unnecessarily cruel manner, he shall be punished with fine which may extend to one hundred rupees, or with imprisonment for a term which may extend to three months, or with both.

Act XLVIII of 1860, section 21.

Whoever cruelly beats, ill-treats, abuses or tortures, or causes or procures to be cruelly beaten, ill-treated, abused or tortured, any animal, shall for every such offence be liable to a fine not exceeding one hundred rupees, and in default thereof to imprisonment with or without hard labour for a period not exceeding three months.

(1) (1891) 65 L. T. 378.
(2) (1881) 50 L. J. (M. C.) 67.
(3) (1892) 66 L. T. 649.
(4) (1894) 2 Q. B. 412.
(5) (1897) 1 Q. B. 772.
(6) (1898) 2 Q. B. 306.
(7) (1889) 22 Q. B. D. 736.
(8) (1883) 9 Cal. 849.
(9) (1882) 10 Q. B. D. 44.
(10) (1869) L. R. 4 Ex. 319.

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Young, with *Roughton and Byrne*, for the complainant:—On the first question our contention is that the Company is responsible for the acts of its servants: Smith on Master and Servant, page 309; Mayne, Criminal Law of India, 2nd Edition, page 252. In the present case the Railway Company has delegated to its servants (*i.e.*, the station master and goods clerk at Talegaon railway station) the responsibility of deciding how many cattle could be put in a truck without any infringement of the law, and if these servants make a mistake the Company is liable: see Smith on Master and Servant, page 310; Maxwell on Interpretation of Statutes, pages 144-145; *Rex.* v. *Medley*(1); *Rex.* v. *Marsh*.(2)

CANDY, J.:—The Second Presidency Magistrate has, under section 432, Criminal Procedure Code, referred two questions of law under the following circumstances. He has found as a fact that, in January last, twenty-seven head of cattle were carried by the G. I. P. Railway from Talegaon (Poona District) to Bombay in such a manner as to subject the animals to unnecessary pain or suffering.

The information was laid by the Secretary and Treasurer of the Society for the Prevention of Cruelty to Animals under section 21 of Act XLVIII of 1860 and section 3 (*b*) of Act XI of 1890. The Magistrate found that there could be no conviction under section 21 of Act XLVIII of 1860, because the cattle were put in the truck at Talegaon by the owner of the cattle under the supervision of the goods clerk, and the Company could not be liable for the acts of its servants when done in spite of a circular issued by the Traffic Manager to station masters to prevent the overloading of cattle, and contrary to the express directions it contained. The Magistrate, therefore, held that unless it could be established that the Company either encouraged the overloading of the truck, or knew that it was probable that the truck would be overloaded, no *mens rea* could be established. The Magistrate proceeded:

> Looking also to the wording of section 21, it appears to be the intention of the Legislature to make the individual who actually abuses or ill-treats an animal liable; and separate provision has been made for the punishment of

(1) (1834) 6 C. & P. 293.

(2) (1824) 2 B. & C. 717.

abettors in the latter part of the same section. Section 3 (*b*) of Act XI of 1890 is, however, altogether different. A person includes a company or corporation, and the only question that the Court has to consider is who carried the cattle.

Then after quoting the case of *Rex.* v. *Marsh*[1] mentioned in Mayne's Criminal Law, the Magistrate concluded:

It is clear, therefore, that under the second section no *mens rea* need be established, and the second point must be decided against the Railway Company.

The third point before the Magistrate was whether the goods yard at Wadi Bundar is such a place as is mentioned in section 3 of Act XI of 1890. Section 3 relates to cruelty in public places. The Magistrate decided this point in the affirmative. But his judgment was contingent on the opinion of the High Court on the following two points:

1st—Is the Company liable under the above circumstances for the acts of the owner of the cattle and the goods clerk at Talegaon under section 3 (*b*) of Act XI of 1890, though they may have no knowledge as to how the animals were carried?

2nd—Is the Wadi Bundar goods station a place accessible to the public, where the Company's orders are that men on business alone should be admitted there?

On the second point we stated our opinion in the affirmative at the close of the hearing. There is clearly a distinction in the Act between private places, for entering which a warrant would be necessary (see sections 4, 5 and 6), and public places (see sections 3 and 7). The goods yard is, no doubt, a public place. The public may have a limited right of access, but, as a fact, no one is prevented from going inside the yard (compare the case of *Ex parte Kippins*[2]).

The first point is, however, more difficult; and we took time to consider what our opinion should be. At the outset we may remark that by the terms of the reference we consider that our opinion must be confined to the question set out by the Magistrate, which is briefly whether the Railway Company is criminally liable under section 3 (*b*) of Act XI of 1890, "though they may have no knowledge as to how the animals were carried." We express no opinion as to whether "cruelty" was legally established in this case, or as to whether there is any-

(1) (1824) 2 B. & C. 717. (2) (1897) 1 Q. B. 1.

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thing repugnant in the Act to the word "person" including a corporation like the Railway Company. The Magistrate has formed an opinion on these points without seeking our advice. Also we must take it that the Magistrate has found as a fact that the Company did take action to prevent improper loading of cattle on its trucks. We cannot, therefore, accede to the argument of Mr. Young for the prosecutor, that the Company must, in the eyes of the law, be taken to have *mens rea* because it had delegated to its servants the responsibility of deciding how many cattle can be put into a truck without cruelty. The reason given by the Railway official in his evidence for not making a hard and fast rule is apparently a sensible one. No doubt there are cases in which a master may be penally responsible for the act of his servant, unless he can show that what was done was in contravention of his orders. In the present case we take it that the cattle were put into the truck at Talegaon in such a manner as to subject the animals to unnecessary pain or suffering "in spite of the circular and contrary to the express direction it contained." There thus being an absence of *mens rea*, direct or implied, the question is, can the carriers of the cattle be convicted under section 3 (*b*) of Act XI of 1890? The Company were the carriers; there can be no doubt about that. And the Magistrate has found as a fact that the cattle were carried in such a manner as to subject the animals to unnecessary pain and suffering, owing to the fact that the owner of the cattle and the goods clerk at Talegaon put too many cattle into one truck.

With a view to assisting the Court in forming an opinion on this point the learned counsel have quoted many cases. We do not think it necessary to go through these in detail. The principle which must govern the point will be found in such text-books as Maxwell on the Interpretation of Statutes (3rd Edition) and Mayne's Criminal Law of India (2nd Edition), in which reference to many of the cases quoted will be found. Speaking generally, the principle is that a man cannot be convicted of a criminal offence unless he has a guilty mind. But in many cases knowledge *(scienter, mens rea)* is not necessary and the true test is to look at the object of the Act, and to see how far knowledge is of the essence of the offence created. Act

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XI of 1890 was passed because it was deemed expedient to make "further provision for the prevention of cruelty to animals." But there is no indication in the Act that any part of the further provision was to create an offence apart from any knowledge on the part of the offender. The object of the Act, apparent on the face of it, was to consolidate and bring into one enactment the provisions of various local Acts, and to remove the anomaly in the general provision of the law (section 34 of Act V of 1861) which was confined to roads or streets in towns, and to acts which caused obstruction, inconvenience, &c., to residents and passengers.

The first penal section is section 3. Clause (*a*) was apparently with some slight variation taken from section 21 of Act XLVIII of 1860 (which with certain unrepealed sections of Act XIII of 1856 formed the Police Act of the Presidency Towns), and it was apparently based on section 2 of the English Act for the prevention of cruelty to animals (Stat. 12 and 13 Vic., c. 92).

The Presidency Magistrate held that looking to the wording of section 21 of the Police Act it appears to be the intention of the Legislature to make the individual who actually ill-treats an animal liable. This is apparently a correct view, and there is no reason why it should not be equally good for clause (*a*) of section 3 of Act XI of 1890. The "causing or procuring" is not inserted in clause (*a*), because by the present definition of "offence" (which was not law in 1860) in section 40 of the Penal Code, this is covered by "abetment." The words of section 2 of 12 and 13 Vic., c. 92, touch only the person who actually does the act of cruelty: see *Powell* v. *Knight*[1] and *Elliot* v. *Osborne*.[2] The same rule would hold good with reference to clause (*a*) of section 3 of Act XI of 1890, which was not made applicable to Bombay, because the corresponding section 21 of Act XLVIII of 1860 is applicable.

Then we come to clause (*b*) of section 3 of Act XI of 1890. That is apparently taken from section 12 of the English Act (12 and 13 Vic., c. 92), the wording of which is "if any person shall convey or carry or cause to be conveyed or carried in or upon any vehicle any animal, &c." The words of the Indian

(1) (1873) 38 L. T. N. S. 607. (2) (1891) 65 L. T. N. S. 378.

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Act are "binds or carries any animal, &c." The addition of the word "binds" and the omission of all mention of "vehicle" at first sight seem to show that the framer of the Indian Act had primarily in his mind the notoriously cruel manner in which birds are sometimes tied up and carried. But he may have purposely used the general expression "binds or carries" in order to include any kind of carrying, whether by hand or conveying in or on a vehicle. There is, however, no indication that as regards this "cruelty" he wished to draw a distinction between clauses (*a*) and (*b*) and to make a carrier penally liable under clause (*b*), though the cruelty was practised contrary to his explicit directions. Similarly clause (*c*) of section 3 seems to be aimed at the individual who actually offers, exposes, &c. Mr. Young argued that as regards the former part of this clause *scienter* would be immaterial, because by the word "which he has reason to believe" in the latter part *scienter* would be material. We do not agree with this argument. We do not think that a clause can be so split up, and that without express words the Legislature must be taken to have intended to make penally liable a person, who technically through his servants is in possession "of live animal which is suffering pain, &c.," though he may be ignorant of the fact, and the servants in so doing may have acted contrary to his explicit instructions.

Sections 4 and 5 are obviously aimed at the individual who does the cruel act. It was contended that because in the latter part of clause (1) of section 6 and in section 7 the words "permits" or "wilfully permits" are found, therefore in the sections in which these words are not found *scienter* is unnecessary. We cannot agree with this contention. Take section 4: suppose the owner of a large dairy, in which one of the employers, in the course of his employment, performs the operation called *phuka*; the servant would be liable under section 4, but would the master also be liable? Our conclusion from a general consideration of the Act is that it is aimed at the individual who actually practises the cruelty, and that it was not intended by the Legislature to make a master penally liable for the act of his servant done in the course of the servant's employment, and certainly not when the act is done contrary to the orders of the master. Whether a

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corporation like the G. I. P. Railway Company would be liable under section 3 (*b*), if it were proved that the Company had been negligent and had actually connived at the act of the servant, is a question which does not arise in the present case. But having regard to the circumstances and facts found by the Presidency Magistrate, we think that our opinion on the first point should be in the negative. Such an opinion does not render the Act ineffective for its avowed purposes. The very judgment on which the Presidency Magistrate relied (*Rex.* v. *Marsh*[1]) in a passage quoted by Mr. Mayne but not copied by the Magistrate, shows that the defence in the present case might be good. And as Bayley, J., said in the same case, "under this enactment the party charged must show a degree of ignorance sufficient to excuse him." In short, the judgments clearly import that if the defendant could have satisfied the jury of his ignorance, it would have been a defence, though the word "knowingly" was not in the statute: see per Brett, J., in *Queen* v. *Prince*.[2]

Thus, the case relied on by the Presidency Magistrate is really against the view which he took. We direct the record and proceedings to be returned, with our opinion on the first point in the negative, on the second point in the affirmative.

(1) (1824) 2 B. & C. 717. (2) (1875) L. R. 2 C. C. 154 at p. 162.

APPELLATE CIVIL.

Before Mr. Justice Fulton and Mr. Justice Crowe.

BALKRISHNA AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* GOVIND BABAJI AGASHE AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1902. *April* 15.

Civil Procedure Code (XIV of 1882), sections 584-587—Second appeal—Finding of fact by lower Court.

One Ragho died prior to 1856, leaving a widow Anpurnabai, and one son Babaji, who was Anpurnabai's step-son. On Ragho's death Anpurnabai took possession of the land in question in this suit and mortgaged it several times. In 1879 she mortgaged it with possession to the father of the defendants. Anpurnabai died in April, 1887, and in 1899, within twelve years after her death, the plaintiffs,

* Second Appeal No. 549 of 1901.