APPELLATE CRIMINAL.

Before Mr. Justice Barlee and Mr. Justice Divatia.

EMPEROR *v.* BHAWAN SURJI (ORIGINAL ACCUSED No. 1).*

1935
November 26

Indian Penal Code (Act XLV of 1860), sections 379 and 429—Stealing a calf and killing it—Offences of theft and mischief—Two distinct offences—Separate conviction for both the offences not illegal—Criminal Procedure Code (Act V of 1898), section 35.

The accused was charged with the offences of stealing a calf of the complainant, and of committing mischief by subsequently killing it. He was convicted by the trying Magistrate of the offences of theft as well as of mischief under sections 379 and 429 of the Indian Penal Code. A reference being made to the High Court by the District Magistrate that the conviction for the offence of mischief be quashed as illegal:—

Held, that the conviction for both the offences was legal, as the two offences, viz., theft and mischief, were distinct offences and constituted two different acts falling within the definition of theft as well as mischief.

Emperor v. *Ramla Ratanji* [1] and *Hussain Buksh Mian* v. *King-Emperor*,[2] dissented from.

Per Divatia J. Wrongful loss to a person whose property is stolen may be a temporary loss so long as he is kept out of its possession without his consent, while the wrongful loss to a person whose property is destroyed is a permanent loss. The nature of the loss in both the cases is different and falls under the definition of distinct offences. It is, therefore, possible to commit the offence of mischief in respect of stolen property even though some loss has already been caused to its possessor by the offence of theft.

CRIMINAL REFERENCE made by R. S. Mani, Additional District Magistrate, Broach and Panch Mahals.

Offences of theft and mischief.

It was alleged by the prosecution that on April 3, 1935, four accused dishonestly removed the calf of the complainant from the place where it was grazing in the jungle and killed it. Accused No. 1 was charged with the offence of theft and mischief under sections 379 and 429 of the Indian Penal

* Criminal Reference No. 137 of 1935.

[1] (1903) 5 Bom. L. R. 460.
[2] (1924) 3 Pat. 804.

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Code and the remaining three accused were charged with the offence under section 414 of the Code.

The trying Magistrate found all the accused guilty. He convicted accused No. 1 of the offences under sections 379 and 429 of the Indian Penal Code and sentenced him to pay a fine of Rs. 25 for each of the offences. The other accused were convicted of the offence under section 414 of the Indian Penal Code and sentenced to pay a fine of Rs. 10.

The Additional District Magistrate, Broach and Panch Mahals, made a reference to the High Court recommending that the conviction under section 429 of the Indian Penal Code be quashed for reasons as follows :

"The facts are that this accused removed complainant's calf from the latter's possession and thus committed theft. He subsequently killed it. Once the offence of theft is completed, the offence of mischief cannot have been committed in respect of the same animal. The conviction for both the offences was therefore clearly illegal. A similar view was taken by the Bombay High Court in the case reported in 5 Bom.L.R. 460."

Reference was heard.

No appearance for the accused.

Dewan Bahadur P. B. Shingne, for the Crown.

DIVATIA J. This is a reference made by the Additional District Magistrate, Broach and Panch Mahals, recommending that the conviction of accused No. 1 of the offence of mischief under section 429 of the Indian Penal Code be quashed, and that the fine imposed in respect of this offence be remitted.

The accused had been charged with the offences of stealing the calf of the complainant, and of committing mischief by subsequently killing it. The learned Magistrate who tried the case found that the accused stole the calf and thereafter killed it, and he convicted him of the offence of theft as well as of mischief under sections 379 and 429 of the Indian Penal Code, and sentenced him to pay a fine of Rs. 25 for

each of the offences, and in default to suffer rigorous imprisonment for a month for each offence. The other accused were convicted of the offence of assisting in the disposal of stolen property under section 414, Indian Penal Code.

The learned Additional District Magistrate has made this reference because it has been held by this Court in *Emperor* v. *Ramla Ratanji*[1] that a person who stole a fowl and then killed it could not be punished separately for the offence of theft as well as of mischief, and he has recommended that the conviction of accused No. 1 of the offence of mischief was therefore illegal and should be set aside.

The question is whether the separate conviction and sentence for the offence of mischief is correct. It is true that the point is covered by the decision relied on by the District Magistrate, but we are disposed to think, after going through the relevant section as well as the authorities bearing on this point and after hearing the learned Government Pleader, that the view taken in *Emperor* v. *Ramla Ratanji*[1] is not correct and that, at any rate, that decision has ceased to have force after section 35 of the Criminal Procedure Code was amended in 1923 by deleting the word "distinct" between the words "two or more" and "offences". In the above case, no reasons are given for holding that a person who was convicted for stealing a fowl and then killing it could not be convicted separately for theft and mischief. The learned Judges relied on the reasons given by the District Magistrate, viz.: "In *Bichuk Aheer* v. *Auhuck Bhooneea*,[2] it was held that a double sentence for theft and mischief is illegal and improper."

Now, looking to that decision we find that no reasons are also given in that case. It is said that a double sentence for theft and mischief is illegal and improper, and the sentence as part and parcel of the conviction must be set aside. It appears that there are two previous rulings of

[1] (1903) 5 Bom.L. R. 460.

[2] (1866) 6 W. R. (Cr.) 5.

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this Court which though not reported in any authorised series have been printed in Ratanlal's Unreported Criminal Cases. The first of the rulings, which is printed at page 129 of that book (*Queen-Empress* v. *Genya*[1]), says that a person who stole a bullock and then killed it, can only be convicted of theft and not of mischief also. Here again no reasons are given in the order. It is only stated that the prisoner ought not to have been convicted of mischief in respect of the bullock which he had been convicted of stealing. The Sessions Judge who made the reference in that case was of the opinion that the act of killing the bullock after the accused person had acquired possession of it, though unlawfully, did not constitute an offence punishable after the offender was convicted and punished for the theft. In the second case, which is printed at page 430 (*Queen-Empress* v. *Krishna*[2]) of that book, a contrary view has been taken by another Bench of this Court. There the accused were charged with the offence of stealing a bullock as well as committing mischief and the trying Magistrate convicted them of both the offences. The District Magistrate made a reference to this Court, being of the opinion that the conviction for the offence of mischief was not justified by law because it was doubtful whether, after a theft was committed, it was possible to commit the offence of mischief in respect of the stolen property, as the loss had already been inflicted on the owner by the theft, and it was rather a straining of the law to hold that the destruction of the stolen property was a second offence. This Court, however, did not accept that view and held that the separate convictions and sentences were not illegal, that the theft preceded the mischief, and that the two acts of theft and mischief were separate; that the stolen property was not transferred by the theft and the prisoners were rightly punished by separate sentences for the fresh act of mischief. None of these two cases have been noticed in the case in

[1] (1877) Ratanlal's Unrep. Cr. Cas. 129.

[2] (1889) Ratanlal's Unrep. Cr. Cas. 430.

Emperor v. *Ramla Ratanji*,[1] which is decided upon the view taken in *Bichuk Aheer* v. *Auhuck Bhooneea*.[2]

As there has been no appearance on behalf of the accused in this case, the learned Government Pleader has very fairly invited our attention to the case of *Hussain Buksh Mian* v. *King-Emperor*,[3] which has taken the same view which has been taken in *Emperor* v. *Ramla Ratanji*,[1] viz., that where a person who steals an animal kills it for the purpose of eating it, he cannot be convicted of the offences of theft and mischief. In this case reliance has been placed upon *Emperor* v. *Ramla Ratanji*,[1] as well as the decisions in the case of *Madar Saheb*[4] and *Bichuk Aheer* v. *Auhuck Bhooneea*,[2] and the learned Judge says that there can be no doubt that where theft of an animal has been committed, the killing of it afterwards by the person who stole it for the purpose of eating it cannot add another offence.

These are all the reported rulings on this point brought to our notice. It appears to us that the view taken in *Emperor* v. *Ramla Ratanji*[1] as well as in *Hussain Buksh Mian* v. *King-Emperor*[3] is erroneous, and that the correct view would be that these two offences are distinct offences and constitute two different acts falling within the definitions of theft as well as of mischief. For the offence of theft what is necessary is "the dishonest removal of movable property out of the possession of any person without his consent", and the essence of the offence of mischief is the wrongful destruction or diminution in the value of any property so as to cause loss or damage to any person.

It is true that the element of dishonesty, that is to say, the causing of wrongful loss or wrongful gain to some person, is a common element in both these offences. But it cannot be said that simply because the accused has caused wrongful loss to another person by taking away his property without

[1] (1903) 5 Bom. L.R.460.
[2] (1866) 6 W. R. (Cr.) 5.
[3] (1924) 3 Pat. 804.
[4] (1902) 1 Weir 497.

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his consent, the subsequent act of destruction of that property would not be an offence because the wrongful loss is already caused by taking it away from its possessor. Wrongful loss to a person can be caused in a variety of ways. Wrongful loss to a person whose property is stolen may be a temporary loss so long as he is kept out of its possession without his consent, while the wrongful loss to a person whose property is destroyed is a permanent loss. The nature of the loss in both cases is different and falls under the definitions of distinct offences. It is, therefore, possible to commit the offence of mischief in respect of the stolen property even though some loss has already been caused to its possessor by the offence of theft. The explanations to section 425 say that the offence of mischief may be committed with regard to any property and against a person who may not be the owner of the property and it may be committed with regard to the offender's own property. This would show that the essence of the offence of mischief consists in the wrongful destruction or diminution in value of any property, whether it is one's own, or somebody else's. It seems to me, therefore, on the wording of sections 378 and 425, Indian Penal Code, that these two acts are distinct offences and that the intention to cause wrongful loss by the destruction of property is different from the intention to cause wrongful loss by its mere removal from a person's possession.

It may be noted that sections 428 and 429 deal with certain aggravated forms of mischief one of which is killing certain animals and are made punishable with a higher sentence. Thus killing an animal in certain cases is made a distinct offence. A man may thus simply kill an animal without stealing it and if his case falls under the definition of mischief, he would be guilty of the offence of aggravated form of mischief in certain cases, or he may at first intend to steal it and thereafter intend to kill it, in which case, there is no reason why the two acts which are both

recognised as distinct offences should not be punished as such. Even if the animal is stolen with the intention of subsequently killing it and thereafter it is killed, the legal position would not be different.

It may also be noted that the present section 35 of the Criminal Procedure Code does not contain the word "distinct" which the previous section 35 did. It says: "When a person is convicted at one trial of two or more offences, the Court may . . . sentence him, for such offences, etc. . . . " It is not necessary now, in order to give separate punishments, that the two offences should be distinct, and a man can be convicted of and separately punished for any two offences, subject to the provisions of section 71 of the Indian Penal Code. In the present case, not only are these two offences distinct, but both of them are covered by two separate definitions and are committed at different times.

I, therefore, think that the trying Magistrate was right in holding that the accused was guilty of both the offences. That being so, it is not necessary to pass any order on this reference, and the papers should be sent back to the District Magistrate.

BARLEE J. I agree with the order proposed by my learned brother. The case has been sent to us by the learned District Magistrate because of the decision in *Emperor* v. *Ramla Ratanji*.[1] That decision was that a person who steals a fowl and then kills it cannot be punished separately for the offences of theft and mischief. No reasons are given in the judgment, and in view of the amendment of section 35, Criminal Procedure Code, which has been pointed out by the learned Government Pleader, it is no longer binding on us.

The question we have to decide is whether, after the wrongful loss was caused to the owner of the calf by the

[1] (1903) 5 Bom. L. R. 460.

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theft, any further wrongful loss was caused to him by the killing of the animal. On this point different Courts have taken different views and no clear and considered ruling has been cited. In my view the wrongful loss which was caused to the owner by the removal of the animal was different from the wrongful loss which was caused to him by its destruction. By the theft he was deprived temporarily of the animal, and when it was killed the deprivation was made permanent.

I agree then with my learned brother that the accused has committed two distinct offences and was rightly convicted both under sections 379 and 429 of the Indian Penal Code.

Answer accordingly.

J. G. R.

PRIVY COUNCIL.

J. C.* 1936 *March* 3

THAKORE SAHEB OF LIMDI, APPELLANT *v.* KHACHAR MANSUR RUKHAD AND OTHERS, RESPONDENTS.

KHACHAR MANSUR RUKHAD AND OTHERS, APPELLANTS *v.* THAKORE SAHEB OF LIMDI, RESPONDENT.

[On Appeal from the High Court at Bombay.]

Evidence Act (I of 1872), sections 17, 18 and 31—Admissions in an agreement—Suit against third party—Legal effect of admissions—Code of Civil Procedure (Act V of 1908), order I rule 10 (2)—Necessary parties—Gujarat Talukdars' Act (Bombay Act VI of 1888), section 2—Amending Act (II of 1905)—Mulgametis, whether talukdars of Khadol Barwala Taluka.

In an agreement made in 1922 between the Thakore Saheb and Government, the Thakore Saheb agreed (*a*) that the Kathis or Girasias holding jivai lands in Barwala shall be entered as Mulgametis in the Settlement Registers and (*b*) that the said Mulgametis shall be considered as talukdars for the purposes of the Gujarat Talukdars' Act so as far as the jivai lands were concerned.

In 1925 the Thakore Saheb instituted the present suits against the Mulgametis for a declaration that he was the proprietor and talukdar of the suit villages. The

**Present :* Lord Thankerton, Sir Shadi Lal and Sir George Rankin.