CRIMINAL REVISION.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Beverley.

1895
April 30.

PROSONNO KUMAR PATRA (PETITIONER) *v.* UDOY SANT (OPPOSITE-PARTY).*

Theft—Penal Code (Act XLV of 1860), section 379—Removal of debtor's property by the creditor—Penal Code as drafted in 1837, section 363.

With a view to coerce the complainant to pay a sum of Rs. 14, which he owed to the accused, three head of cattle worth Rs. 60 were removed from the complainant's homestead under the order of the accused: *Held*, the offence of theft was not committed by the accused.

The illustrations to section 378 of the Penal Code indicate that it was the intention of the Legislature that, in order to have committed theft within the meaning of the section, the taker must have taken the thing with the intention of keeping it himself, or disposing of it for his own benefit, or in some way which would compel the owner to pay him money which he did not owe him in order to regain his property.

The words "intending to take dishonestly any moveable property" in the above section, read with section 23 and section 24 of the Penal Code, mean "with the intention of gaining by unlawful means property to which he is not legally entitled." "To gain property by unlawful means" means "to gain the thing moved for the use of the gainer," and not "the gaining possession of it for a time for a temporary purpose."

Section 363 of the Penal Code as drafted in 1837 discussed.

WITH a view to coerce the complainant to pay a sum of Rs. 14, which he owed to the accused as rent, three head of cattle worth Rs. 60 were, under the order of the accused, removed from the complainant's homestead. On the 19th of January 1895 the accused was convicted of theft under section 380 of the Penal Code, and sentenced to six months' rigorous imprisonment by the Deputy Magistrate of Midnapore. On appeal the Sessions Judge upheld the conviction, but reduced the sentence to rigorous imprisonment for one day and a fine of Rs. 50. On the 21st of March 1895 the accused obtained a rule from the High Court to show

* Criminal Revision No. 74 of 1895, against the order passed by J. Pratt, Esq., Sessions Judge of Midnapore, dated the 28th of January 1895, modifying the order of A. C. Mackertich, Esq., Deputy Magistrate of Midnapore, dated the 19th of January 1895.

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cause why the conviction should not be set aside, on the ground that no offence under section 380 of the Penal Code had been committed.

Mr. *M. Ghose*, Mr. *Barrow* and Babu *Ashutosh Mukerjee* appeared on behalf of the petitioner in support of the rule.

The *Deputy Legal Remembrancer* (Mr. *Kilby*) for the Crown, with Babu *Murali Lall Mozumdar* and Babu *Sarat Chandra Roy Chowdhry* for the prosecutor appeared to show cause.

Mr. *M. Ghose*,— It is found that the complainant owed the accused Rs. 14, and that, in order to put pressure upon the complainant to pay that sum, the cattle were removed and detained. That is not theft under the Penal Code. In England it would clearly not amount to stealing. *Reg* v. *Wade* (1). The Indian cases do not go so far as to lay down that a creditor may be guilty of theft by removing the goods of the debtor to compel the latter to pay up his just debt.

The *Deputy Legal Remembrancer* shewing cause.—The English law is different. The Penal Code expressly does away with the necessity of what is known as the *animus furandi*. *Queen* v. *Madaree Chowkeedar* (2), decided by three Judges of this Court, has long settled the question; see also *Queen* v. *Preonath Banerjee* (3).

Mr. *M. Ghose* in reply.—The case of *Madaree Chowkeedar* (2) has been misunderstood. There it is assumed that the taking was dishonest. Besides, the prisoner was not himself a creditor, and he had therefore no right to remove the cows. In *Preonath Banerjee's* case (3) it does not clearly appear from the report that the act was done to compel the payment of a just debt and not to extort more than was due. The strongest case in favour of Mr. Kilby's contention is that of *Queen-Empress* v. *Gangaram Santaram* (4). But in that case I submit the principle laid down in *Cape* v. *Scott* (5) has been misapplied. See Mr. Starling's notes on that case in his Indian Criminal Law, 5th edition, p. 441. The Legis-

(1) 11 Cox's Cr. Ca., 549. (2) 3 W. R., Cr., 2.
(3) 5 W. R., Cr., 68. (4) I. L. R., 9 Bom., 135.
(5) L. R., 9 Q. B., 269.

lature could never have intended that if a hotel-keeper were to remove the boxes from the top of the carriage of a lodger who was about to leave without paying his bill, he should be found guilty of theft. [PETHERAM, C.J.—A hotel-keeper may have a lien over the luggage of his lodger.] Whether that is so in this country or not, let us take the case of a boarding-house keeper, or the case of any ordinary creditor. In the case of *Queen* v. *Soshee Bhosun Roy* (1) it was held to be no theft to remove a *khatta* book of the complainant for the purpose of producing it in evidence against him. The learned Judges (Kemp and Glover, JJ.) in that case were the same as in *Madaree Chowkeedar's* case (2). It is not wrongful gain or wrongful loss to remove and detain goods temporarily when it is done for the purpose of compelling payment of what is justly due. If the demand had been illegal the case might be different. The following cases were also cited: *Rex* v. *Dickinson* (3), *Rex* v. *Crump* (4).

The judgment of the Court (PETHERAM, C.J., and BEVERLEY, J.) was as follows :—

On the 19th January last, the petitioner, Prosonno Kumar Patra, was convicted of an offence under section 380 of the Penal Code, and was sentenced to six months' rigorous imprisonment. On appeal, the Sessions Judge of Midnapore upheld the conviction, but reduced the sentence to rigorous imprisonment for one day and a fine of Rs. 50. On the 21st ultimo, the petitioner obtained a rule from this Court to show cause why the conviction should not be set aside, on the ground that no offence under section 380 of the Penal Code had been committed.

The case for the prosecution was that, on the 13th December last, three head of cattle worth Rs. 60 were removed from the complainant's homestead under the immediate order of the petitioner, with a view to coerce the complainant to pay a sum of Rs. 14, which he owed to the petitioner as rent. The defence was that the cattle were handed over to the petitioner's servants voluntarily in part-payment of a debt due by him, and that the petitioner himself was not present at the time and knew nothing of the

(1) 4 Shome's Rep., 14.
(2) 3 W. R., Cr., 2.
(3) R. & R., 420.
(4) 1 C. & P., 658.

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occurrence. This defence has been found false by the lower Courts, and the question before us is, whether, upon the case for the prosecution, the offence of theft has been committed.

The history of the Indian legislation which deals with theft and other offences against property, is interesting and instructive. In the Penal Code, as drafted in 1837, the section which defined theft was section 363, and was in these words: "Whoever intending to take fraudulently anything which is property, and which is not attached to the earth, out of the possession of any person, without that person's consent, moves that thing in order to such taking, is said to commit theft." The section was followed by several explanations, the last of which was: "A person may commit theft, though he intends to restore the property after taking it," and by a number of illustrations, among which were the following:—

(*o*) *A* takes an article belonging to *Z* out of *Z's* possession, without *Z's* consent, with the intention of carrying it back to *Z* and of pretending to have found it, in the hope of thus obtaining a reward from *Z*. Here *A* takes fraudulently. *A* has therefore committed theft.

(*q*) *A* and *Z* are gardeners. *Z* has reared a pine-apple of extraordinary size in hope of obtaining a prize. *A* takes the pine-apple without *Z's* consent, produces it before the judges as his own, and obtains the prize. He then sends back the pine-apple to *Z*. Here, as *A* took the pine-apple fraudulently, *A* has committed theft, though he has restored the pine-apple.

(*t*) *A*, being on friendly terms with *Z*, goes to *Z's* library, in *Z's* absence, and takes away a book without *Z's* express consent. Here it is probable that *A* may have conceived that he had *Z's* implied consent to use *Z's* books. If this was *A's* impression *A* has not committed theft.

(*y*) *A*, believing in good faith that *Z* owes him a thousand rupees, and only intending to pay himself what is due to him, without injury to any party, takes property out of *Z's* possession without *Z's* consent. *A*, not acting fraudulently, is not guilty of theft. But he may have committed an offence under the provisions contained in the chapter entitled "Of the illegal pursuit of legal rights."

(z) But if *A*, in the last illustration, intended to take and appropriate more than sufficient to repay himself, or intended, after repaying himself, to prosecute *Z* for the debt, here, as such an intention was fraudulent, *A* commits theft.

The offence of the illegal pursuit of legal rights, which was contemplated by the framers of the Draft Code, was defined by section 460 of the Draft Code as follows: "Whoever in good faith, believing a debt to be legally due, takes, or attempts to take, any property from the person whom he believes to owe that debt, not fraudulently, but in order to satisfy that debt, under such circumstances that, if his intentions were fraudulent, he would be guilty of theft or robbery, shall be punished with imprisonment of either description for a term which may extend to one year or fine or both."

Added to the section were several illustrations, of which the first was (*a*): "*A*, believing in good faith, that *Z* owes him one hundred rupees, in order to satisfy the debt, takes property belonging to *Z*, not fraudulently, but under such circumstances that, if he took it fraudulently, he would be guilty of theft. *A* sells that property for one hundred and fifty rupees, and sends back fifty rupees to *Z*, *A* has committed the offence defined in this clause."

In the appendix to the Draft Code, the framers in note (*O*) say in speaking of this offence: "This act is distinguished from theft by one of the broadest lines of demarcation which can be found in the Code. It is not a fraudulent act. It is intended to correct a wrongful distribution of property, to do what the Courts of law, if recourse were had to them, would order to be done. Public feeling would be shocked if such a creditor were called by the ignominious name of a thief."

It does not appear that at this time the framers of the Code intended to make the taking possession of the property of a debtor by his creditor in order to pay a just debt any offence at all, inasmuch as such an act is excluded from the operation of section 363 by illustration (*y*), and from that of section 460 by the terms of the section itself and by those of illustration (*a*), both of which provide that the taking must be to satisfy the debt in order to be an offence within that section.

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On the 23rd of July 1846, the Indian Law Commissioners presented their first report on the Penal Code, and in paragraphs 486 and 487 deal with the offence of theft as defined in section 363 of the Draft Code. In paragraph 486 they say: "The Code differs from the Digest in the explanation that a person may commit theft though he intends to restore the property after taking it, whereas by Article 30, section 1, Chapter XVIII of the Digest, it is declared that it is not theft where the intent is to deprive the owner of the temporary possession only, and not of his absolute property, in the thing taken. Thus the intent expressed in the definition given in the Digest is to despoil the owner and fraudulently appropriate the thing taken and removed, while the intent expressed in the definition in the Code is merely to take fraudulently, that is to say, to take with the purpose of causing wrongful gain to the party taking, or some other, by means of wrongful loss to the party from whom the thing is taken, or by depriving him of the benefit which he would have enjoyed if it had not been taken from him." In paragraph 487 the Commissioners go on to discuss illustration (*q*) to the section, and come to the conclusion that it is necessary and sufficient for the purpose for which it was framed, but they add that there is a difference of opinion between them as to whether the *principle of the Digest, or that of the* Draft Code, is the one on which the Legislature ought to act.

In the second report of the Commissioners, which was dated June 24th, 1847, they discuss, in paragraphs 308 to 317, the provisions in the Draft Code, which create the offence which is described as the illegal pursuit of legal rights, and intimate that they approve of them.

The Indian Penal Code became law in 1860. In that Code, section 378 takes the place of section 363 in the Draft Code, and the only practical difference between the two sections themselves is that the word "dishonestly" is substituted for the word "fraudulently;" but the definitions in sections 23 and 24 of the Penal Code attach precisely the same meaning to the word "dishonestly" as was attached to the word "fraudulently" by sections 15 and 16 of the Draft Code. Several of the explanations attached to the section in the Draft Code are changed, and the one which we hav

quoted above is entirely omitted, as are also illustrations (*q*), (*y*) and (*z*). The whole of the provisions which related to the illegal pursuit of legal rights have disappeared; but to section 403, which deals with the offence of criminal misappropriation of property, the following explanation is appended: "A dishonest misappropriation, for a time only, is a misappropriation within the meaning of this section," and several illustrations are given, among which is (*b*): "*A* being on friendly terms with *Z*, goes to *Z's* library, in *Z's* absence and takes away a book without *Z's* express consent. Here, if *A* was under the impression that he had *Z's* implied consent to take the book for the purpose of reading it, *A* has not committed theft. But if *A* afterwards sells the book for his own benefit, he is guilty of an offence under this section."

As we have before noticed, the section itself is practically the same now as it was when it stood in the Draft Code, as although one word has been substituted for another, the two words have the same meaning attached to them by the definitions, and the question we have to consider is whether it is clear from the words used by the Legislature that it was their intention that the offence of theft should be committed when property is taken out of the possession of the owner, without his consent, with the intention of returning it to him and without the intention of gaining anything by the temporary detention, except something to which the taker is legally entitled, notwithstanding the fact that the explanation and illustration, which had been inserted in the Draft Code for the express purpose of making it theft to deprive a person temporarily of the use and enjoyment of his property, were deliberately omitted when it was passed into law.

The only one of the illustrations to the present section, which throws, we think, any light on this question, is (*l*): "*A* takes an article belonging to *Z* out of *Z's* possession, without *Z's* consent, with the intention of keeping it until he obtains money from *Z* as a reward for its restoration. Here *A* takes dishonestly. *A* has therefore committed theft."

A consideration of this illustration shows that the person who is represented as taking the thing, takes it with the intention of appropriating it to his own use, and not merely of using it for a

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temporary purpose, in the same sense that a person who buys an article for the purpose of selling it again immediately, buys it in order to appropriate it to his own use, though he only intends to keep it for a very short time. In the case in the illustration, the taker takes the thing with the intention of keeping it until he can exchange it for money, or something else, to which he is not entitled, and this appears to us to be stealing the thing taken in the most ordinary sense of the word. So that, as far as the illustrations to the existing sections help us, they indicate that it was the intention of the Legislature that in order to have committed theft, within the meaning of the section, the taker must have taken the thing with the intention of keeping it himself, or disposing of it for his own benefit, or in some way which would compel the owner to pay him money which he did not owe him, in order to regain his property.

The words in the present section "whoever, intending to take dishonestly any moveable property out of the possession of another, moves that property, etc.," must be read with the definitions in sections 23 and 24, and the section will then read, "whoever, with the intention of gaining by unlawful means property to which he is not legally entitled, moves that property, etc," and the question comes to be, whether to gain property by unlawful means, means to gain the thing moved for the use of the gainer, or whether it means the gaining possession of it for a time for a temporary purpose. We think that the first is the more natural meaning of the words, and that, even without the history of this section, that is the meaning which we should put upon them; but when we know that it is that which the framers intended them to bear, and that the Legislature refused to sanction the explanation and illustration which would have given them a wider meaning, we think the matter becomes abundantly clear.

We now proceed to examine the decisions of the various Courts in India on the subject. They are:—

1. *Queen* v. *Madaree Chowkeedar* (1), decided by Peacock, C. J., with Kemp and Glover, JJ., on the 17th of February 1865. The learned Judges held that the prisoner who had taken the goods of a

(1) 3 W. R., Cr., 2.

debtor and divided them amongst his creditors, forcibly and against his will, was guilty of theft.

2. *Queen* v. *Preonath Banerjee* (1), decided by L. S. Jackson, J., on the 16th of April 1866. The learned Judge held that the forcible and illegal seizure by a creditor of his debtor's bullock in order to satisfy his claim was theft.

3. *Jowahir Shah* v. *Gridharee Chowdhry* (2), decided by E. Jackson and Hobhouse, JJ., on the 9th of September 1868. The learned Judges held that where the accused prevented the complainants from proceeding in a certain direction with their carts, and exacted a sum of money from them, a toll which they had no right to claim, they were guilty of wrongful restraint, but not of theft.

4. *Queen* v. *Tarinee Prosad Banerjee* (3), decided by Kemp and Glover, JJ., on the 4th of June 1872. The learned Judges held that the carrying off of certain buffaloes belonging to the complainant by order of the accused, and the detention of them in the custody of his servant, amounted to an abetment of theft as defined in the Penal Code. The facts of this case do not appear at all clearly from the report, but as the learned Judges say it was very similar to that of *Queen* v. *Madaree* (*supra*) we assume that there was evidence that the accused intended to deprive the complainant entirely of his buffaloes, or to detain them until he got something to which he was not entitled in exchange for them.

5. *Aradhun Mundul* v. *Myan Khan Takadgeer* (4), decided by Glover and Mitter, JJ., on the 4th of June 1875. The learned Judges held that the illegal seizure and impounding of cattle is not theft within the meaning of the Penal Code, even if effected with the malicious intent of subjecting the owners to additional expense, inconvenience and annoyance. In this case, it does not appear that the accused intended themselves to make any profit from their own illegal act.

6. *Queen* v. *Shoshee Bhushun Roy* (5), decided by Kemp and Glover, JJ., in 1876. The learned Judges held that where a person improperly obtained possession of a *khatta* book, and retained it with

(1) 5 W. R., Cr., 68. (2) 10 W. R., Cr., 35.
(3) 18 W. R., Cr., 8. (4) 24 W. R., Cr., 7.
(5) 4 Shome's Rep., 14.

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the intention of using it in a judicial enquiry as evidence against the person to whom it belonged, he had not committed theft, as such temporary retention could not cause wrongful loss to the owner within the meaning of the Code.

7. A Madras case, reported in Weir's Law of Offences and Criminal Procedure, p. 232 (3rd edition), decided on the 20th of February 1880, by the Chief Justice and Innes, J. The facts were that the accused, creditor of the prosecutor, drove away sundry head of cattle, during his absence, in order to put pressure upon him and get his debt paid. The learned Judges held that such taking caused wrongful loss to the prosecutor, was dishonest and therefore theft, and that it made no difference that the taking was intended to be only for a time.

8. *Queen-Empress* v. *Nayappa* (1), decided on the 27th of January 1890 by Birdwood and Jardine, JJ. The learned Judges held that the accused who had seized a boat which belonged to the complainant, while conveying passengers across a creek which flowed into a river at a point within three miles from a public ferry, his intention being to compel persons who had to cross the creek to use the ferry in the absence of the complainant's boat, and so to increase the income of the ferry, had committed theft, though it was not his intention to convert the boat to his own use, or to deprive the complainant permanently of its possession.

9. *Paryag Rai* v. *Arju Mian* (2), decided by the Chief Justice and Beverley, J., on the 18th of August 1894. The accused were found to have loosened the complainant's cattle at night and driven them to the pound, with the object of sharing with the pound-keeper the fees to be paid for their release. The learned Judges held that in that case the elements of theft were present, and directed that the accused should be tried for that offence.

This examination of the decisions shows that the learned Judges of the Madras High Court in 1880 thought that the section of the present Code had a more extended meaning than

(1) I. L. R., 15 Bom. 344.
(2) I. L. R., 22 Calc., 139.

that in the Code as originally drafted, even with the explanation which was omitted when the Code became law, and a more extended meaning than the section in the Draft Code which dealt with the illegal pursuit of legal rights, inasmuch as that section was limited to cases in which the property was illegally taken in satisfaction of a claim, and the Madras Court has held that it is theft for a creditor to deprive his debtor of the temporary possession of some article of his property, in order to put pressure on him to force him to pay a just debt. It also shows that in 1890 the learned Judges of the Bombay High Court thought that the present section has the same meaning as that given to the section in the Draft Code by the explanation which was omitted when the Code became law, as they held that it was theft to deprive a person of the possession of his property for a limited time, although there was no intention on the part of the accused to appropriate the property to his own use in any way. The earlier decisions in this Court are not fully reported, and it is difficult in some cases to ascertain from the reports what the precise facts of the cases were, but from the most careful examination of those cases which we can give them, we do not think that the learned Judges of this Court have ever intended to give the section of the present Code a wider meaning than that given it by illlustration (*l*) which we have quoted above, the effect of which is that it is theft if a person takes the property of another for the purpose of extorting from the owner, in exchange for the thing taken, something which the taker has no right to claim. We are of opinion that the Courts of Madras and Bombay have given to the section a more extended meaning than it was intended by the Legislature to bear, and that the history of the law shows that what we understand to have been the reading of the section by the Judges of this Court has been the correct one. For these reasons we think that upon the case for the prosecution the offence of theft has not been committed, and the rule will be made absolute to set aside the conviction. The fine, if it has been paid, will be refunded.

S. C. B. *Rule made absolute. Conviction set aside.*