Before Mr. Justice Geidt and Mr. Justice Woodroffe.

EMPEROR
v.
SHEIKH ARIF.*

1908
Feb. 26.

Theft—Mischief—Running water—Cutting embankment of channel and diverting running water—Penal Code (Act XLV of 1860) ss. 379, 430.

Where the accused cut the embankment of a *pyne* and drew the water to their own lands and were convicted of theft and mischief under ss. 379 and 430 of the Penal Code:—

Held, that running water not reduced into possession could not be the subject of theft.

Per GEIDT J. (WOODROFFE J. *dubitante*) that the cutting of the embankment constituted an offence under s. 430 of the Penal Code.

Ferens v. *O'Brien*(1) distinguished.

THE petitioners, Sheikh Arif and others, in the two cases, were tenants in the village of Belwa, which was let in *thikka* to the Sathi factory. A *pyne* or water channel ran through the village to the *zerait* lands of the factory. The accused cut the embankment of the *pyne* in order to irrigate their own fields. The factory claimed the *pyne* with the water as theirs by right of construction, while the accused claimed a right to take water on the ground that they, like all other tenants, had to pay the factory 1½ anna per *bigha* as irrigation charges. The Sub-divisional Magistrate of Bettiah, who tried the cases, found that the accused had no right to take water from the *pyne* without the permission of the manager of the factory, and he accordingly convicted them under ss. 379 and 430 of the Penal Code and sentenced them to fines of Rs. 25 each. They then moved the Sessions Judge of Muzaffarpore, who made the present reference recommending that the convictions and sentences should be set aside.

Babu Atulya Charan Bose (*M. Songhat Ali* with him), for the petitioners. Running water could not in this case be the subject

* Criminal Reference Nos. 17 and 18 of 1908, by S. C. Mallick, Officiating Sessions Judge of Muzaffarpore, dated Jan. 20, 1908.

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of the offence of theft as it was not in the possession of the factory at the time the accused cut the embankment. Nor is the latter act an offence under s. 430 of the Penal Code, as the accused claimed a right to take water from the *pyne* and acted in good faith.

Mr. Garth (*Babu D. N. Mitra* with him), for the opposite party. Water may be the subject of theft: see *Ferens* v. *O'Brien*(1). The Magistrate has found that the accused did not act *bona fide*. By cutting the embankment they caused a diminution of the supply of water for agricultural purposes, and thus came within the terms of s. 430 of the Penal Code.

GEIDT J. The accused in these two cases are tenants in village Belwa, which is let in *thikka* to the Sathi factory. There is a *pyne* or water channel running through the village by which water is conveyed for the irrigation of the *zerait* lands of the factory. The accused are found to have cut the embankment of this *pyne* with the object of irrigating their own fields, and have been convicted of theft of the water under s. 379 of the Penal Code, and also of mischief by doing an act which caused, or which they knew to be likely to cause, a diminution of the supply of water for agricultural purposes, the latter being an offence punishable under s. 430. Each of the accused has been sentenced to pay a fine of Rs. 25. The Sessions Judge is of opinion that in the circumstances of the case, and on the findings of the Magistrate, the convictions cannot be sustained under either of these two sections, and he has accordingly referred the cases to this Court with the recommendation that the convictions and sentences be set aside.

I agree that the conviction under section 379 of the Indian Penal Code cannot be sustained. The water runs freely through the channel from the river and flows into some *khal* or *jhil*, unless it is diverted for irrigation. This fact distinguishes the present case from *Ferens* v. *O'Brien*(1) quoted by Mr. Garth, where the water was confined in pipes, which were closed by taps. There the water was reduced into the possession of the Water Company,

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which supplied it. In the present case the water running freely along the channel is not reduced to possession, till it is actually brought on to the land irrigated. The factory, therefore, cannot be said to have been in possession of the water taken by the accused, and the offence of theft was not committed by taking it.

The ground on which the Sessions Judge holds that the conviction under section 430 is bad, is that the Magistrate has found that there is no evidence to show that the accused knew that the *zerait* lands of the factory or the lands of any one else further down the *pyne* were being irrigated. The Sessions Judge points out that for all the accused knew, the water in the *pyne* might be running to waste, and it cannot, therefore, be held that the accused were likely to cause wrongful loss to other people, who were irrigating their lands lower down the *pyne*. In his view, therefore, one of the elements of mischief was wanting. It is clear, however, that the act of the accused caused a diminution of the supply of water for agricultural purposes. In one of the cases the Magistrate says that most of the water was being taken out of the *pyne*. The supply of water available for irrigation being thus lessened, its value or utility was diminished, whether it was actually being used or not. If the accused were not entitled to take the water, they would by their act be causing wrongful loss to those to whom the *pyne* belonged, and to those, who were entitled to take the water, and, if they knew that they were not entitled to take the water, they must have had the intent to cause, or knowledge that they were likely to cause wrongful loss, and their act would be punishable under section 430 of the Penal Code.

It was, therefore, for the prosecution to prove (*i*) that the accused were not entitled to take the water, and (*ii*) that they knew that they were not entitled to take the water. The Magistrate has found both these points against the accused. He has held that the factory constructed the *pyne*, and that the manager has always kept under his control the distribution of water therefrom. He has also held that the accused were not acting under a *bona fide* claim of right. On these findings, which are findings of fact, the accused were guilty of the offence provided for in section 430.

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This Court does not ordinarily interfere on revision with findings of fact, and it never interferes with such findings, unless it is clearly satisfied that the findings are wrong or that there is no evidence to support them. To proceed otherwise would be to treat as appeals cases coming before us on revision.

As regards the construction of the *pyne* there is evidence that the *pyne* was constructed and is maintained by the factory, and the Magistrate points out in the case of Sheikh Arif that the evidence of two out of the three witnesses for the defence is to the same effect. *Prima facie*, then, the accused were not entitled to take the water. But it is said that having regard to the history of the *pyne*, the accused may have been under the *bona fide* belief that they were entitled to take the water. The *pyne* may have been constructed and may be maintained by the factory, and the primary use to which the *pyne* has been put may have been the irrigation of the factory *zerait*. Nevertheless the evidence shows, and it is not disputed, that the villagers holding land along the *pyne*, including the inhabitants of the Belwa village, have in past years irrigated their lands from the factory, that this has been going on for the last twenty years and that the *raiyats* have latterly been paying to the factory irrigation charges at the rate of $1\frac{1}{2}$ annas a bigha. But the evidence also shows, and this evidence has been believed by the Magistrate that the villagers used the water not as of right but by permission. The *raiyats* in return for growing indigo for the factory were allowed to irrigate from the *pyne*, not only the indigo, but other crops as well. The irrigation charges, moreover, are paid not for the use of the water, but for work done by the factory at the request of the villagers themselves. That work is the clearance of the branch distributaries leading from the pyne to the village lands. Formerly the poor villagers had to do this work and the rich villagers got the water first, and so, to give an equal chance to all, the factory clears those branch channels. Some of the villagers themselves may be employed in the actual work, but they are paid by the factory, which recoups itself by levying the charges mentioned. This is an arrangement made by mutual agreement. The evidence also shows that the factory has had

entire possession and control of the village irrigation, deciding which village in turn shall be allowed to use the water, and this is confirmed by the fact that, while *pynes* are usually a fruitful source of quarrels among the villagers using them, in the case of the present *pyne* these quarrels have been conspicuous by their absence through its entire history. It is true that in a few cases the *pyne* has been cut and the water used without permission first obtained, but the manager, Coffin, deposes that all these cases were settled by him, that is, the factory's right to the exclusive control of the *pyne* was asserted on one side and admitted on the other.

No doubt the present cases would not have arisen had not *raiyats* ceased to grow indigo for the factory. The arrangement, whether express or implied, was that the *raiyats*, if they should grow indigo, a crop which does not ordinarily pay them, would be allowed to irrigate both their indigo and their oats, but this concession was not as of right, but on permission in each case obtained. When the *raiyats* ceased to grow indigo, the existence of the arrangement could not give rise in them to the belief that they were nevertheless entitled to take the water, and the manager on his side, recognising that the arrangement was at an end, ordered that the irrigation charge for the year 1315, the year in which the occurrence took place, should not be levied. Whether this order was or was not known to the villagers makes no difference. The material circumstance is that hitherto the exclusive possession and control of the factory has been admitted by taking permission beforehand, or by settling the few cases, where this was not done.

There is not only no reason for thinking that the accused had a *bonâ fide* belief that they were entitled to take the water, but their own conduct in running away, when they were discovered cutting the *pyne*, and afterwards sending for permission, shows positively that they had no such *bonâ fide* belief.

In this view of the matter, I am unable to hold on the findings that this was not a matter for the Criminal Court. I would accordingly refuse to interfere with the conviction under section 430, while setting aside the conviction under section 379. I would also allow the sentence of fine to stand.

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WOODROFFE J. As regards the conviction under section 379 I think it cannot stand, as it is at least doubtful on the facts proved whether the water can be said to have been so reduced into possession as to be the subject of theft. I agree, therefore, that the conviction under section 379 must be reversed.

Then as regards section 430 I think it may not unreasonably be held on the facts found that the accused did an act which caused, or which they knew to be likely to cause, a diminution of the supply of water for agricultural purposes. I am, however, myself doubtful whether on the facts proved and the claim of right asserted, this is a matter which should be disposed of in the Criminal Court. Having regard, however, to the three circumstances, that the question on this point is one of fact, that my learned brother agrees with the finding of the trying Magistrate on this point, that the conviction is one for mischief, and that the sentence is one of fine only, I do not think it necessary to differ from the order he proposes to make as regards the charge under section 430, the conviction under which section must therefore stand.

E. H. M.