

CRIMINAL REVISION.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

BOLAI DE

v.

EMPEROR.*

1907

Dec. 18.

Rescue from lawful custody—Assault to deter public servant from discharge of duty—Arrest by duffadar for theft, not committed in his presence—Theft whether a continuing offence—Penal Code (Act XLV of 1860) ss. 225, 353 and 379—Village Chaukidari Act (Beng. VI of 1870) s. 39, cl. (2).

The arrest by a *duffadar* of a person for theft on complaint made to him, but not committed in his presence, is illegal under s. 39(2) of Bengal Act VI of 1870; and neither the rescue of such person from his custody nor the threat to beat him does amount to any offence under s. 225 or s. 353 of the Penal Code.

The offence of theft is not a "continuing" one.

ONE Jadu Bagdi, on seeing one Radhanath Dey cutting and removing some plantain trees from his garden and placing them on a cart waiting outside, cried out that his plantain trees were being stolen away. The *duffadar* on hearing the cry ran to the spot and saw a cart loaded with five or six freshly-cut plantain trees being driven away by Radhanath along the road next to the garden, and being followed by Jadu who told him that the trees had been cut from his garden by Radhanath. The *duffadar* seized the latter and proceeded with him and the cart-load of plantain trees a short distance towards the thana, when the petitioners came up and rescued Radhanath with the cart and the plantain trees from his hands. The petitioner, Bolai, ordered the *duffadar* to be beaten, and the petitioner, Gokul, raised his *lathi* to strike him, but the blow was averted by one Sital who happened to be then present.

The petitioners were put on their trial before Babu Ashutosh Bagchi, the Sub-divisional Magistrate of Kalna, and were convicted, No. 1 under ss. 225 and $\frac{353}{114}$, No. 2 under ss. 225 and

* Criminal Revision No. 1256 of 1907, against the order of Ashutosh Bagchi, Deputy Magistrate of Kalna, dated June 4, 1907.

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353, and Nos. 3 and 4 under s. 225 of the Indian Penal Code, and sentenced Nos. 1 and 2 to pay a fine of Rs. 50 each, and Nos. 3 and 4 a fine of Rs. 30 each.

The Magistrate made the following observation as to the legality of the arrest:—

“The offence of theft was continuing at the time when the stolen property was being removed. Under section 59, Criminal Procedure Code, even a private person had a right to arrest Radhanath who was then committing the theft. The custody in which Radhanath was detained was, therefore, certainly legal.”

Babu D. N. Bagchi, for the petitioners. The offence of theft is not a continuing one. It was completed when the trees were cut and taken out of the garden, *i.e.*, out of the possession of the owner: compare *Nemai Chatteraj v. Queen-Empress*(1). The *duffadar* had no authority to arrest Radhanath when the theft was not committed in his presence: see s. 39, cl.(2) of Act VI of 1870 (B. C.). Nor had he power to do so under s. 54 of the Criminal Procedure Code, since he is not a “police officer,” nor under s. 59 of the Criminal Procedure Code, as a private person, too, could not make the arrest if the offence had not been committed “in his view.” His custody, therefore, was not a “lawful custody” within the meaning of s. 225 of the Penal Code, nor was he in the “lawful discharge of his duty” within the meaning of s. 353: see *Kalai v. Kalu Chowkidar*(2), *Raman Singh v. Queen-Empress*(3).

No one appeared for the Crown.

RAMPINI AND SHARFUDDIN JJ. This is a Rule calling upon the District Magistrate of Burdwan to show cause why the conviction of, and sentences passed on, the petitioners should not be set aside.

The petitioner No. 1 has been convicted under sections 225 and ³⁵³/₁₁₄, the petitioner No. 2 under sections 225 and 353, and the petitioners Nos. 3 and 4 under section 225 of the Indian Penal Code. The petitioners, Nos. 1 and 2, have each been sentenced to pay a fine of Rs. 50, and each of the petitioners, Nos. 3 and 4, a fine of Rs. 30.

(1) (1900) I. L. R. 27 Calc. 1041. (2) (1900) I. L. R. 27 Calc. 366.

(3) (1900) I. L. R. 28 Calc. 411.

The learned pleader, who appears on their behalf, states that his clients have committed no offence, because the persons whom they rescued had not been legally arrested by the *duffadar* who was the complainant in this case. The *duffadar* appears to have arrested one Radhanath Dey against whom a complaint of theft had been made by one Jadu Bagdi. But he was apparently not justified in arresting Radhanath Dey, because under section 39, clause (2) of Act VI of 1870 (B.C.) he was only entitled to arrest a person for theft committed in his presence. It is clear that the theft in the present case had been completed before he came up, and the offence is not a continuing one, as contended by the Deputy Magistrate. Therefore, the *duffadar* had no right to arrest Radhanath Dey. In these circumstances, he was not engaged in the *lawful* execution of his duty when the petitioners came and rescued Radhanath Dey and threatened to beat the complainant.

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We, therefore, set aside the convictions and sentences and direct that the fines, if paid, be refunded. The Rule is thus made absolute.

Rule absolute.

E. H. M.