CALCUTTA HIGH COURT

Queen-Empress

Vs

Churn Chungo

(W Comer Petheram, C.J. Prinsep and Pigot, JJ. Macpherson and Banerjee, JJ.)

20.12.1895

JUDGMENT

W. Comer Petheram, C.J.

1. I am of opinion that the accused was rightly convicted, and that there is no reason for the interference of the Court in this case.

2. A comparison of the judgment in the case of Prosonna Kumar Patra v. Udoy Sant (ante, p. 669) with the whole of the definitions contained in Section 23 of the Penal Code, will shew that no effect has been given in that judgment to the last two paragraphs of the section.

3. The judgment proceeds on the assumption that when the words in the definition are read into Section 378 of the Penal Code in place of the words "dishonestly," the section will read "whoever, with the intention of gaining by unlawful means property to which he is not legally entitled, moves that property, is said to commit theft." It is evident that in making such an assumption the last two paragraphs of Section 23 have been left out of consideration, and if they as well as the first paragraph are read into Section 378 it will read as follows: "Whoever in order to take with the intention of gaining property by unlawful means moves that property, or whoever in order to take with the intention of retaining by unlawful means property which he does not intend to acquire, moves that property, or whoever moves property in order to take it with the intention of keeping the person entitled to the possession of it out of the possession of it by unlawful means, though he does not intend to deprive him permanently of it, is said to commit theft." When the section is read in this way it is evident that it was the intention of the Legislature that it should be theft under the Code to take goods in order to keep the person entitled to the possession of them out of the possession of them for a time, although the taker did not intend to himself appropriate them, or to entirely deprive the owner of them. This is precisely what a creditor does, who by force or otherwise takes the goods of his debtor out of his possession against his will in order to put pressure on him to compel him to discharge his debt; and it must follow that a person who does so is guilty of theft within the provisions of the Indian Penal Code.

For these reasons I think that the case of Prosonno Kumar Patra v. Udoy Sant (ante, p. 669) was wrongly decided.

Pigot, J.

4. (Prinsep and Macpherson, JJ., concurring).-We agree in the opinion that the case of Prosonno Kumar Patra v. Udoy Sant (ante, p. 669) was wrongly decided. We think that upon the facts of that case the accused had been rightly convicted of theft.

5. We think that it is not necessary to constitute the offence of theft that there should be shown on the part of the accused an intention (to use the words at page 676 ante) "to gain the thing moved for the use of the gainer"; but that it is enough to show an intention to gain possession of it for a time for a temporary purpose We think the proposition stated in Mayne's Penal Code (14th Ed.) at page 340 is correct. It is as follows: "It is sufficient to show an intention to take dishonestly the property out of any person's possession without his consent, and that it was moved for that purpose. If the dishonest intention, the absence of consent, and the moving are established, the offence will be complete, however temporary may have been the proposed retention.

6. We think that this proposition is in accordance with the definition of theft in Section 378 of the Code; and that it was laid down in the cases of *Quean v. Madaree*[1] *Queeen v. Preo Nath Banerjee*[2] and In the matter of the petition of Tarinee Prosaud Banerjee (18 W.R. Cr. 8), and in the case reported in Weir, page 233 (3rd ed.), cited in the case of *Prosonno Kumar Patra. v. Udoy Sant and also in the cases in Weir*[3] We think that the decisions of this Court above referred to are not intended to be limited to cases coming within illustration (1) of Section 378 but were intended to affirm and did affirm and lay down the wider construction of the section stated in the passages, from Mayne above cited which, as we have said, we hold-to be correct.

7. We do not propose to consider the history of the Penal Code from its original draft by Lord Macaulay in 1840 to its becoming law in 1860. Their Lordships of the Privy Council, in the recent case of The *Administrator-General of Bengal v. Prem Lall Mullick ante*[4]*,* have held that it is not competent to refer to proceedings of the Legislature as legitimate aids to the construction of a law.

8. We think that an intention on the part of the accused to use the possession of the property when taken for the purpose of obtaining satisfaction of a debt due to him, and only for that purpose, has no bearing on the question of dishonest intention under the Penal Code. To hold that such a purpose could render innocent what would be otherwise a wrongful gain within the meaning of Section 23 would amount to the recognition of a right on the part of every individual to recover an alleged debt by the seizure of property of his alleged debtor, and would tend to a state of things in which every man might, if strong enough, take the law into his own hands.

9. It is necessary, we think, to point this out and perhaps the more necessary, having regard to the views expressed by the Officiating Sessions Judge in the letter in which, under the provisions of Section 438, he submits this case to the Court.

10. Mr. Justice Prinsep and Mr. Justice Macpherson agree in this judgment.

Banerjee, J.

11. The question that arises for determination in this case is, whether a creditor, by taking any moveable property of his debtor from the debtor's possession without his consent with the intention of coercing him to pay his debt, commits the offence of theft as defined in Section 378 of the Indian Penal Code.

12. To constitute theft as denied in the section referred to-

(1) There must be an intention to take some moveable property, (2) The taking intended must be dishonest, (3) It must be from the possession of another person without his consent, and (4) There must be a moving of the property in order to such taking,

(2)

13. Now, if there was an intention to take here within the meaning of the section, the third and fourth requirements are evidently satisfied; for the buffalo and the bullock were taken from the possession of the debtor without his consent and were carried away. The points for consideration, therefore, are, first, whether there was an intention to take within the moaning of the section, and, second, whether the taking intended was dishonest.

14. That there was a taking of the animals is not denied; but it may be said that the taking contemplated by the section is a permanent taking and not a mere temporary taking, such as there has been in this case, in order to force the debtor to pay his debt. I do not think that such a view is correct. Illustration (1) of the section clearly shews that taking a thing with the intention of keeping it only for a time is taking within the meaning of the section.

15. It remains now to consider whether the taking in this case was a dishonest taking according to the definition of "dishonestly" in Section 24, that is to say, whether the taking was "with the intention of causing wrongful gain to one person or wrongful loss to another." I think the question must be answered in the affirmative, as the creditor in taking and detaining the animals intended to cause both wrongful gain to himself and wrongful loss to the debtor within the meaning of Section 23; for he retained, by unlawful means, property to which he was not legally entitled, and he unlawfully kept his debtor, who was legally entitled to the property, out of possession and enjoyment of the same. "Wrongful gain" according to the definition in Section 23 is constituted not only by wrongful acquisition of property (which is in accordance with the

ordinary meaning of the words) but also by wrongful retention of the same, even though such retention does not result in any profit to the person retaining it: so "wrongful loss" is constituted not only by wrongful deprivation of property, but also by the being wrongfully kept out of the same.

16. And a thing is said to be done "dishonestly" according to the definition in Section 24, not only when it is done with the intention of causing wrongful gain to one person in the first mentioned sense of the words "wrongful gain" (and this is in accordance with the ordinary popular signification of the term), but also when it is done with the intention of causing wrongful gain in the other sense, or done only with the intention of causing wrongful loss to some one, though such loss to one person may not be accompanied by any wrongful gain to another.

17. It is this comprehensive nature of the definition of "dishonesty" in the Indian Penal Code which brings within the definition of "theft" cases which may cot come under the ordinary popular signification of the term, and which has led to the use of such expressions as "technical theft."

18. By graduating the scale of punishment for theft from rigorous imprisonment for three years and fine limited only by the power of the Court holding the trial to a nominal fine, the Penal Code has no doubt provided a safeguard against its comprehensive definition of theft leading to any hardship. But there is one anomaly which the criminal law on this point has not been able to avoid. The offence of theft is made a non-bailable offence (see Schedule II of the Code of Criminal Procedure); so that, though a person accused of theft may after conviction be let off with a fine only, if his offence be a light one, yet before conviction and pending trial he must, unless the case comes under Section 497 of the Criminal Procedure Code, or unless a superior Court interferes under Section 498, remain in custody.

19. In making the foregoing observations, I must guard myself against being supposed to under-estimate the gravity of an offence like the one which has been committed in this case.

20. The view I bake, namely, that the act of the accused in this case comes within the definition of theft in Section 378 of the Indian Penal Code, is in accordance with the general consensus of opinion in this Court and in the High Courts of Bombay and Madras. I need only refer *to Quean v. Madarec*[5] *Queen v. Preo Nath Barterjee*[6], In the matter of the petition of Tarinee Prosaud Banerjee (18 W.R. Cr. 8), *Queen-Empress v. Nagappa*[7] and the Madras case reported in Weir's Law of Offences and Criminal Procedure, 3rd edition, p. 233. Against these authorities there is the case of Prosonno Kumar Patra v. Udoy Sant (ante, p. 669) which no doubt takes the opposite view. Being the latest case on the point and the one that has led to this Full Bench Reference, it requires examination.

21. The grounds of the decision in Prosowno Kumar Patra v. Udoy Sant (ante p. 669) are, shortly

stated, these three:

(1) The taking contemplated by Section 378 of the Indian Penal Code is either a permanent taking or a temporary taking with intent to appropriate the thing taken to the taker's use.
(2) The definition of "dishonestly" read with Section 378 shows that the wrongful gain of the thing moved must mean gain of the thing "for the use of the gainer" and not mere "gaining possession of it for a temporary purpose."
(3) The omission from the Code as enacted of certain provisions which were inserted in the draft Code supports the view embodied in the first ground.

22. I have already shown that the first mentioned ground is not sound, as it is opposed to illustration (I) of Section 378.
23. The second ground deals with only one part of the definition of "dishonestly," namely, that which speaks of wrongful gain in one of the two senses in which that expression is used, and it takes no notice of the other part which refers to wrongful loss, nor of the other meaning of wrongful gain. But as I have shown above dishonesty is constituted by either of these two elements in either of the two senses being present; and there can be no doubt that both wrongful gain and wrongful loss were intended to be caused in this case.

24. As to the third, ground, it is enough to say that if the definition in the Code as enacted clearly includes, as I think it does, a case like the present, the omission from it of certain provisions that found a place in the draft Code can warrant no safe inference to the contrary.

25. For all these reasons I agree generally in the opinion expressed by Mr. Justice Pigot. I must respectfully dissent from the decision in Prosonno Kumar Patra v. Udoy Sant (ante, p. 669), and answer the question referred to us in the affirmative.

26. That being my opinion, I must hold that the accused in this case has been rightly convicted of theft: and there being no reason to think that the punishment is too severe, I would affirm both the conviction and the sentence.

Cases Referred.

13 W.R. Cr. 2
25 W.R. Cr. 68
3(3rd cd.) at pp. 235, 244 and 245
4p. 788 : L.R. 22 I.A. 107
53 W.R. Cr. 2
65 W.R. Cr. 68
7I.L.R. 15 Bom. 344