1890
SEP. 8.
ORIGINAL
CIVIL.
15 B. 338.

the broker who made arrangements for delivering the stuff, has not been called, and we do not know what arrangements he made. Godowns do not close before 7 P.M. usually, and not before 6 P.M. on Saturdays, and considerably later if there is pressure of work. If Champsi had arranged with [344] two or three vendors to deliver the goods, there would have been no difficulty in completing delivery within godown hours, for the whole delivery could be made by a single firm in three or four hours. If Champsi had tried and failed to make delivery within godown hours, another question might have arisen; but, putting another reason forward for non-delivery, the defendant did not instruct Champsi to deliver the goods at all; and whether he (Champsi) could have done so without unreasonable difficulty depends upon conjecture. It was for the defendant to prove it. The defendant obtained the requisite information to enable him to deliver when in office and within godown hours. A letter putting his native agency into operation would have ensured the delivery within contract time, and the defendant has not shown that it would not have ensured the delivery on Saturday, as it certainly would on Sunday. I hold that the defendant has not established his technical defence, and that a decree must pass in favour of the plaintiff. Decree for plaintiff for Rs. 2,500 and costs.

Attorneys for the plaintiff :—Messrs. *Pestonji and Rustim.*

Attorneys for the defendant :—*Messrs. Wadia and Ghandy.*

---

15 B. 344.

CRIMINAL REFERENCE.

Before Mr. Justice Birdwood and Mr. Justice Jardine.

QUEEN-EMPRESS *v.* NAGAPPA.* [27th January, 1890.]

Penal Code (Act XLV of 1860), s. 378—Theft—Dishonest intention—Wrongful gain—Wrongful loss.

A charge of theft will lie under s. 378 of the Indian Penal Code (Act XLV of 1860) even where there is no intention to assume entire dominion over the property taken, or to retain it permanently.

When a person takes another man's property, believing, under a mistake of fact and in ignorance of law, that he has a right to take it, he is not guilty of theft because there is no dishonest intention, even though he may cause wrongful loss within the meaning of the Indian Penal Code.

The accused was the brother of a farmer or contractor of a public ferry on the Tadri river. He seized a boat belonging to the complainant while conveying passengers across the creek which flows into the river at a point within three miles [345] from the public ferry. His intention was apparently to compel persons who had to cross the creek to use the ferry in the absence of the complainant's boat, and thereby increase his brother's income derived from fees to be paid by passengers crossing the creek. The accused had no reason to believe that he was justified in seizing the boat.

Held, that the accused was guilty of theft, though it was not his intention to convert the boat to his own use, or deprive the complainant permanently of its possession.

[R., 22 C. 1017 (1025) (F.B.); 4 Bom. L.R. 936 (938); 1 L.B.R. 334; Rat. Unr. Cr. Cas. 908; U.B.R. (1897—1901), 339 Cr.; 15 Cr.L.J. 436=24 Ind. Cas. 172; Cons., 22 C. 669 (678).]

* Criminal Reference No. 165 of 1889.

1890
JAN. 27.

CRIMINAL REFERENCE.

15 B. 344.

THIS was a reference under s. 438 of the Code of Criminal Procedure (Act X of 1882).

The accused was the brother of a contractor or farmer of a public ferry on the Tadri river. He seized a boat belonging to the complainant while conveying passengers across the creek which flows into the river at a distance of about three miles from the ferry. His intention was evidently to force persons who had to cross the creek to use the public ferry in the absence of the complainant's boat, and thereby increase his brother's income derived from the fees to be paid by the passengers.

The Second Class Magistrate convicted the accused of theft and sentenced him to rigorous imprisonment.

On appeal, the Sub-divisional Magistrate upheld the conviction and sentence, holding that though the accused did not intend to convert the boat to his own use, he had still acted dishonestly in seizing the boat. He further found that the accused had not acted in good faith, as he had no reason to believe that he had any right to seize the boat.

The Sessions Judge was of opinion that as the prosecution had failed to prove that the boat was seized with the intention of permanently depriving the complainant of its possession, the accused was not guilty of theft. He, therefore, referred the case to the High Court under s. 438 of the Code of Criminal Procedure (Act X of 1882), submitting his opinion that the conviction and sentence should be set aside.

There was no appearance for the Crown or for the accused.

OPINION.

BIRDWOOD, J.—The accused's brother is the contractor or farmer of a public ferry on the Tadri river; and the accused has been convicted by the Second Class Magistrate of theft for **[346]** seizing a boat, belonging to the complainant, in which passengers were being conveyed across a creek, which flows into the river at a point within three miles from the ferry. The conviction was upheld, on appeal, by the Sub-divisional Magistrate, who found that, though the accused did not mean to convert the boat to his own use, he seized it with a dishonest intention, inasmuch as the consequence of his act would be to deprive the complainant of fees from passengers, if any fees were paid by the persons crossing the creek in the complainant's boat, and to increase the fees that would be received by the ferry contractor from persons who wished to cross the creek, and would be forced to cross it in the contractor's boat, if the complainant's boat was removed. The Sub-divisional Magistrate found, further, that the accused had not acted in good faith, as he could not possibly have believed that he was justified in seizing the boat. He was of opinion, therefore, that though the taking would not have amounted to larceny under English law, it fell within the definition of theft under the Indian Penal Code (Act XLV of 1860). The Sessions Judge has referred the case to the High Court, in order that the conviction and sentence may be set aside as illegal. He is of opinion that it was incumbent on the prosecution to prove that the boat was taken with the intention of permanently depriving the complainant of its possession. In this view the Sessions Judge seems to be supported by the decision of the Calcutta High Court in *Adu Shikdar* v. *Queen-Empress* (1). But for reasons which I will presently state I do not concur with the Sessions Judge. He is also of opinion that no charge of theft could lie

(1) 11 C. 635 (644).

1890
JAN. 27.

CRIMINAL REFERENCE.

15 B. 344.

in respect of the prospective fees derivable by either the complainant or the contractor from the conveyance of passengers across the creek, and he does not concur in the distinction drawn by the Sub-divisional Magistrate between the offences of larceny and theft; and thinks that as there was nothing in the case to show that the accused had any *animus furandi* in removing the boat, he was entitled to an acquittal.

To constitute larceny under the English law, the taking should be not only wrongful and fraudulent, but should also be "without [347] any colour of right." "All the cases show that if the intention were not to take the entire dominion over the property that is no larceny" (per Parke, B., in the *The Queen* v. *William Holloway* (1). There was apparently no such intention in the present case. Again, if the property was taken "with the intention of making a temporary use of it only, and then of letting the owner have it again, there is no larceny, but only a trespass" (per Campbell, C. J., in *The Queen* v. *Trebilcock* (2). It was not, apparently, the accused's intention in the present case to detain the complainant's boat permanently.

It is found, however, that the complainant was within his rights in plying with a boat on the creek, and that he would have been within his rights in taking fees from passengers, if he wished to do so, as the ferry farm on the Tadri river does not extend to the creek. The accused acted illegally in seizing the boat; and if it be assumed for the moment, contrary to the finding of the Second Class Magistrate, that he may have so acted by reason of a mistake of fact, that is, by reason of a mistake as to the extent of his brother's rights, and have believed that the complainant was infringing those rights, still such a mistake could furnish no defence of his illegal act, for if there had been no mistake at all he would not have been justified in seizing the boat. If the complainant had conveyed passengers on the river itself within three miles on either side of the ferry, he would have been liable to a penalty under s. 14 of Bombay Act II of 1868; but neither the contractor nor any person acting in his interests or on his behalf would have had the right under the Act, or under any other law, to seize the boat. In such circumstances, a person who took the law into his own hands could clearly take no benefit by the contention that he acted under a mistake of fact.

The Second Class Magistrate has not only found that the accused has falsely stated that his brother was allowed by the Government to ply his boat on the creek as well as on the river, and that he knew that he could not detain private boats without the permission of the Collector or the Mamlatdar; but the Sub-divisional Magistrate has also practically found that the [348] accused could not have believed that he had any right to seize the complainant's boat which had been plying for many years on the creek, where it had the right to ply. This latter finding is important as bearing on the accused's state of mind at the time when he seized the boat.

Illustration (*l*) of s. 378 of the Indian Penal Code (Act XLV of 1860) shows that a charge of theft will lie even where there is no intention to assume the entire dominion over the property taken or to retain it permanently. It is the case of a person taking an article out of the owner's possession, without his consent, "with the intention of keeping it until he obtains money" from the owner for its restoration. He is

(1) 1 Den. C. C. 370 (375). (2) 27 L. J. (N. S.) M. C. (103).

1890
JAN. 27.

CRIMINAL REFERENCE.

15 B. 344.

declared to have take dishonestly and, therefore, to have committed theft. Under s. 23 of the Indian Penal Code (Act XLV of 1860) a person gains property wrongfully when he retains wrongfully as well as when he acquires wrongfully; and a person loses wrongfully when he is wrongfully kept out of any property as well as when he is wrongfully deprived of it. And under s. 24 " whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person is said to do that thing 'dishonestly.' "

The complainant was kept by the accused wrongfully out of his property from the moment that the accused seized his boat till he returned it, if he ever returned it. The complainant, therefore, suffered wrongful loss. The presumption is that the accused intended the natural consequence of his act. He intended to cause wrongful loss, unless he can show that he had no such intention. If, under a mistake of fact and in ignorance of the law, he believed that he had the right to seize the complainant's boat, when it was plying at the place where he seized it, his state of mind at the time of seizing it would have been innocent and not criminal. Though he caused wrongful loss within the meaning of the Penal Code (Act XLV of 1860), he would not, as a matter of fact, in that case, have intended to cause wrongful loss. There would have been no dishonest intention. The case would then have been similar to the *Queen* v. *Nabin Chunder Holdar*(1) referred to in Mr. Mayne's notes on s. 379 **[349]** of the Indian Penal Code (Act XLV of 1860), where the accused, who was a servant of the Port Canning Company, seized the nets of a party of fishermen who were poaching on the Company's fisheries, and was convicted of theft. The Calcutta High Court set aside the conviction; as dishonest intention, which is an essential ingredient of the offence of theft, was absent, the accused having acting *bona fide* in the interest of their employers in retaining possession of the nets pending their orders, and the taking not having, therefore, been criminal when the possession was changed. The Subdivisional Magistrate has distinguished that case from the present case, where the taking was illegal and was known by the accused to be illegal. The taking caused wrongful loss, as defined in the Penal Code, and was intended to cause the loss which was actually caused. No essential ingredient of the offence of theft appears, therefore, to be wanting in the present case; and we cannot interfere with the finding and sentence.

JARDINE, J.—As the Magistrate who heard the appeal found that the accused did not in good faith believe he was justified in taking the boat, and as the taking was *prima facie* an improper act, I see no reason for interference; see *Luckee Narain Banerjee* v. *Ram Kumar Mukherjee* (2); and Paley on Summary Convictions (4th ed.), p. 121.

Conviction upheld.

(1) 6 W. R. Cr. Rul. 79.

(2) 15 C. 564.