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Court : Kerala

Decided On : Sep-01-1967

Reported in : 1968CriLJ625

Judge : K.K. Mathew, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 76, 725 and 727

Appeal No. : Criminal Revn. Petn. No. 50 of 1967

Appellant : Pappu

Respondent : Damodaran and ors.

Advocate for Def. : T.V. Prabhakaran, Adv. (for Nos. 1 and 2) and; State Prosecutor (for No. 2)

Advocate for Pet/Ap. : M.B. Kurup and; Jose K. Kochupappu, Adv.

Disposition : Revision dismissed

Judgement :

ORDER

K.K. Mathew, J.

1. This revision petition filed by P. W. 1 in the case is directed against an order acquitting the accused of offences punishable under Sections 427, 447 and 506(1)

read with section 34 I. P. C.

2. On the basis of a petition filed by P.W. 1 before the Sub Inspector of Police, Munambom, he registered a case against accused 1 and 2 for the above offences and conducted an investigation. After the investigation, finding that there is evidence to support the case he filed the charge. The prosecution case is that the revision petitioner was in possession of a paramba in Cherai Kara, that accused 1 and 2 have properties to the south of the paramba, that the revision petitioner put up a fence on the southern boundary of his paramba, that on 17-3-1966 at 11.00 a.m. the accused trespassed into that portion of the paramba and demolished the fence and thereby caused damage to him to the tune of Rs. 100.

3. The learned Magistrate found that the accused have demolished the fence put up by P. W. 1 and thereby committed the offence of mischief, and convicted them under Section 427 read with Section 34 I P. C.. but released them after admonition under section 3 of Act 20 of 1958 Accused 1 and 2 filed an appeal before the Sub Divisional Magistrate. The Sub Divisional Magistrate acquitted the accused.

4. The learned Sub Divisional Magistrate found that the accused had bona fide dispute regarding the title and possession of P W. 1 as regards the portion of the property on which the fence was constructed by P. W. 1 and that the accused in demolishing the fence were abating a nuisance and therefore they are not guilty.

5. It was argued on behalf of the revision petitioner that the accused had no bona fide belief that the property on which the fence was constructed belonged to them, or was in their possession and that a simple belief that they are the owners or were in possession without reasonable grounds to support it would not exonerate them from liability for the act committed by them Counsel also submitted that as no evidence was adduced to show that the claim of right of the accused was based on reasonable grounds, the order of acquittal was bad.

6. The question for consideration is whether a claim of right even without reasonable grounds to support it is sufficient to exonerate the accused

7. The expression 'claim of right' does not refer to actual legal right. It meant belief in legal right. Belief in moral right is: irrelevant to this question. In (1963) Criminal Law Review at page 497 it was held to be no defence to a charge of embezzlement when the accused only believed that he ought to have been promoted and thus morally entitled to a higher salary

8. The offence of mischief is defined in the Indian Penal Code in Section 425, which runs as follows:

'Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits 'Mischief'

Explanation. 1 -- It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.

Explanation. 2 -- Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others jointly '

When the fence was destroyed by the accused, if they were under the belief that the fence was constructed in the property belonging to them and in their possession and that P. W. 1 had no right to construct it there, then the accused would be protected. The question whether the fence was constructed in their property or in a property in their possession, is a matter which might depend upon a resolution of questions of fact or law to both

9/. A claim of right as to ownership or possession of property may stem from a mistake of law or a mistake of fact or of both. Ownership or possession in a given case is a mixed question of law and fact and if the mistake relates exclusively to facts, it will negative mens rea. Will it make any difference if the mistake relates to the law? Suppose, the mistake as to ownership or possession results from a mistake of law. Can a person plead that mistake and contend that although

ignorance of law is no excuse yet, he was misled into thinking that the law was so and bona fide believed although unreasonably, in his title and possession and did the act? I think, even if the mistake arose on account of a misunderstanding of the law that the property belonged to the accused or was in their possession and in that belief they went and destroyed the fence, It cannot be said that they would have the necessary intention to cause wrongful loss to the complainant, or the knowledge that that would be the result of their act.

A mistake as to title or possession, whether it arises from mistake of law or of fact negatives mens rea That ignorance of a particular statute may result in a claim of right is illustrated by the case in *Rex v. Hall*. (1828) 172 ER 477. In that case, a gamekeeper took wires and a pheasant from a poacher. By statute the wires were forfeit to the lord of the manor. Brandishing a stick the poacher demanded the two articles back, and the gamekeeper complied, Vaughan, B. held that the poacher could not be convicted of robbery if he thought the articles his Robbery involves a larceny and there was no animus furandi if there was a claim of right. Ignorance of the criminal law is no excuse for an act done in violation of it. But, when a question arises whether a person has a claim of right, ignorance or mistake of the civil law governing the matter would become relevant and assume Importance as negating mens rea. A person who puts forward a claim of right founded on mistake or ignorance of civil law pertaining to the matter need not necessarily establish that the mistake or ignorance arose in spite of reasonable diligence. The only thing necessary is that the mistake must be one which leads the accused to claim that he has a right to act as he does. A mistake as to criminal law only will not give rise to a claim of right; an error as to civil law may do so.

10. An illustration of an unreasonable and yet valid claim of right is supplied by the case in *Regina v. Boden* (1844) 174 ER 863 In that case, the accused said to the complainant: 'Pay me the eleven sovereigns you owe me'. The complainant refused and thereupon accused knocked him down in fact the money was owed not by the complainant but by complainant's father and it was owed not to the accused but to his friend. It was held that the accused could not be convicted of assault with intent to rob, the claim of right negating the intent to rob. A more unreasonable claim could hardly be imagined; nevertheless as the evidence was clear that 'he belief in

the legal right was entertained, that was enough to negative mens rea. Even an unreasonable claim of right might be a defence to damage to property. It would seem that claim of right will exclude a crime against property even though the statute in question does not require malice. Thus claim of right to demolish a house was held to be a defence to a charge of feloniously demolishing the house, notwithstanding the fact that the offence did not verbally require 'malice'. See the decision in *Regina v. Langford*. (1843) 174 ER 653.

11. In *Bank of New South Wales v. Piper*, 1897 AC 383 the Privy Council said:

'The absence of mens rea really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent.'

Lord Bramwell said, in a somewhat different connection:

'I think, with all respect, that in all the judgments there is. I must say it, a confusion of unreasonableness of belief as evidence of dishonesty, and unreasonableness of belief as of itself a ground of action'

See the decision in *Derry v. Peek*, (1889) 14 AC 837.

12. In *Throne v. Motor Trade Association*, 1937 AC 797 at p. 809 Lord Atkin referred to the well established proposition in criminal law that normally a genuine belief in the existence of facts as apart from law, which if they existed would constitute a defence, is itself a sufficient defence.

13. In *Wilson v. Inyang*, 1951-2 KB 799 Lord Chief Justice Goddard said that the belief must be honestly held and that reasonableness of belief was evidence of honesty and that in exceptional circumstances, the court may be satisfied of the existence of an unreasonable belief. In bigamy, a different rule seems to prevail. For instance, in *Bayley*, (1908) 1 C. A. R. 86 the defence to bigamy was that the accused thought his first marriage invalid, having been wrongly so informed by a school-master. Having regard to the evidence generally the court doubted whether the belief was in fact entertained, but held that if any event there was no reasonable grounds for it: and the conviction was therefore 'affirmed. I am not

concerned here with the question whether the rule as laid down in that case is sound in principle. But the rule, I think, is clear that, so far as the offence of mischief is concerned, a claim of right believed to exist, even though unreasonably is a valid defence

14. Counsel for the petitioner said that the belief of the accused that they were the owners or were in possession was not genuine or honest. I do not know whether it is a qualification at all, for, either a party believes or he does not: there seems to be no such thing as dishonest belief. The most that the expressions can refer to is the rule that wilful blindness is equivalent to knowledge.

15. In *Rex, v. Bernhard*, 1938-2 KB 264 the appellant was charged under section 3d of the Larceny Act, 1916, with demanding money with menaces with intent to steal when she threatened to expose complainant's immoral relationship with her unless he fulfilled the promise he made during the subsistence of that relationship to pay certain sums of money to her. The conviction of the appellant was quashed because the trial judge directed the jury that there was no basis upon which the claim of right could be predicated. It was pointed out by the court of Criminal Appeal that the accused was entitled to acquittal if she honestly believed the money she claimed was owing to her, whether there was any basis for the claim or not.

16. It would appear that the accused in the case disputed the right of the revision petitioner to the property in question and were under the belief that the portion of the property on which the fence was constructed belonged to them and was in their possession. There is nothing in the case to show that the assertion of title and possession was a pretence.

17. I think, the learned Sub-Divisional Magistrate was right in holding that the accused had a claim of right to the property and the possession thereof and whoever might be the owner of the property, the accused were protected as they had no intention to cause wrongful damage in demolishing the fence or knowledge that that would be the result of their act. As the accused were found to have entertained the belief--whether reasonable or not -- that they were the owners of the property and were in possession and that P.W. 1 has no right to construct the

fence in the property, their act in demolishing the fence would not constitute the offence of mischief under Section 427.

I confirm the order of acquittal, and dismiss the petition.

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