

Maide Khan and anr. Vs. State

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Court : Rajasthan

Decided On : Aug-21-1964

Reported in : AIR1965Raj72; 1965CriLJ476

Judge : C.B. Bhargava, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 97 and 378

Appeal No. : Criminal Revn. No. 283 of 1963

Appellant : Maide Khan and anr.

Respondent : State

Advocate for Def. : S.R. Singhi, Adv.

Advocate for Pet/Ap. : Thanchand, Adv.

Disposition : Revision allowed

Judgement :

ORDER

C.B. Bhargava, J.

1. This is an application in revision by Maice Khan and Saide Khan against their conviction under Section 326 of the Indian Penal Code. Each of them has been sentenced to rigorous imprisonment for one year.

2. The case of the prosecution against them was that on 2nd March, 1962 at about 1 P. M. Saide Khan Petitioner drove his flock of sheep numbering about 500 into the field of Mohkamsingh (P. W. 2) and Rajendrasingh (P.W. 7) where sarson crop was standing. It is said that the sheep caused considerable damage to the standing crop. Mohkamsingh and Rajendrasingh then collected the sheep and started for Talwara cattle pound to put them there. It is further said that while Mohkamsingh and Rajendrasingh were only a mile away from Talwara, The petitioners along with three other persons namely Umarkhan, Phalak Sher and Sattarkhan riding on horses reached there. Umarkhan and Maidekhan were armed with Sailas, Saide Khan was armed with agandasi, Phalak Sher had a rifle and Sattar-khan a lathi with him. These persons asked Mohkamsingh and Rajendrasingh to release their sheep. On their refusing to do so, they assaulted them with the arms that they were carrying. Rajendra Singh sustained as many as 17 injuries. Out of which 10 were simple injuries caused with a blunt object. One injury with a blunt object was grievous. He had three punctured wounds, three cut wounds and one incised wound. One cut wound which had caused fracture of right ulna bone was grievous. Mohkamsingh received only one injury and that was punctured wound 2.5"x2"x2" on left fore-arm laterally near shoulder. It was caused by some pointed weapon and was simple.

3. On a report of the occurrence being made the police held an investigation and put up a challan against the petitioners only. No challan was put up against Umarkhan, Phalak Sher and Sattarkhan. The petitioners were tried by the Assistant Sessions Judge, Hanumangarh who on a consideration of the evidence led in the Case did not believe the prosecution case that the petitioners' sheep had entered the field of Mohkam Singh (P. W. 2) and Rajendrasingh (P.W. 7) and had caused damage to their sarson crop. The learned Assistant Sessions Judge, further came, to the finding that the act of taking away the sheep by Rajendra Singh and Mohkamsingh to the cattle pound did not amount to the offence of mischief or theft and as such the petitioners had no right of private defence of property, in the opinion of the learned Assistant Sessions Judge, three persons against whom a challan was not put up by the Police had also participated in the crime. In view of the above finding the learned Assistant Sessions Judge convicted the petitioners under Sections 326, 325, 324 and 323 read with Section 34 of the Indian Penal

Code and sentenced them to various terms of imprisonment under the aforesaid sections.

4. On appeal the learned Sessions Judge, Ganganagar agreed with the finding of the trial Court that the prosecution had not succeeded in proving that the sheep had trespassed and damaged the crop of Rajendrasingh and Mohkamsingh. On the oilier question whethr the act of Rajendrasingh and Mokamsingh in taking away the sheep amounted to Offence of theft, he disagreed with the trial court and held that Rajendrasingh had no authority to seize those sheep and his act was unlawful and amounted to theft and the petitioners had a right of private defence of property. He, however, held that he had exceeded that right. He also held that it was not proved that the petitioners were members of an unlawful assembly. He, therefore, set aside their conviction under Sections 325, 324 and 323 of the Indian Penal Code. Since they had exceeded their right of private defence of property, the learned Sessions Judge convicted them under Section 326 of the Indian Penal Code and reduced their sentence to one year's rigorous imprisonment each.

5. In my view on the finding arrived at by the courts below, the conviction of the petitioners in the circumstances of the case cannot be maintained. It has been concurrently found by the courts below that the petitioners' sheep had neither entered the field of Rajendrasingh and Mohkamsingh nor caused any damage to their standing sarson crop, it has been further found that Kajendrasingh and Mohkamsingh were taking away 500 sheep belonging to the petitioners towards the cattle pound. The courts below are not agreed on the question whether the act of Rajendrasingh and Mohkamsingh amounted to theft or not. The trial Court says that the taking away of the sheep was not dishonest as no wrongful gain to themselves or wrongful loss to the petitioners was intended. In this connection the learned Assistant Sessions Judge has referred to *Dayal v. Emperor*, AIR 1943 Oudh 280. The learned Sessions Judge on the other hand held that there was the intention of causing wrongful loss to the petitioners and therefore, the act amounted to theft. Ha has placed reliance on a decision of this court in *Birdha v. State*, AIR 1959 Raj 124 and *Lokenath Sahu v. Rahas Beura*, AIR 1963 Orissa 52.

6. In my opinion the view taken by the learned Sessions Judge on the above question is correct in *Madra Damri v. Emperor*, AIR 1946 Nag 221 it was held that:

'The taking for the purposes of Section 378 must be dishonest and according to the definition of 'dishonestly', In Section 24 Penal Code, the taking may be either with the Intention of causing wrongful gain to one person or wrong-ful loss to another. It makes no difference in the accused's guilt that the act was not Intended to procure any personal benefit to himself.'

The same view was taken in a Bench decision of Lahore High Court in *Jiwana v. Emperor*, AIR 1947 Lah 380. In a recent decision a learned single Judge of Orissa High Court in *Lokenath Sahu's case*, AIR 1963 Orissa 52 has taken the same view and has dissented from the view taken in *Dayal's case*, AIR 1943 Oudh 280. It was held that

'If a person knowing that the cattle have not damaged his crops seizes them and drives them towards the pound his intention is obviously to compel the owner of the animals to incur some expenditure in releasing them from the pound and also to deprive the owner temporarily at any rate of the use of the animals. If they are milk cows he deprives the owner of the supply of milk for some days. Similarly, if they are bullocks, he deprives, the owner of their use for ploughing or other agricultural purposes. Thus his intention to cause wrongful loss to-the owner is clear from the definitions given in Sections 23 and 24 of the Indian Penal Code.'

The learned Judge agreed with the view taken in *Birdha's case*, AIR 1959 Raj 124. In Rajasthan case the question was about the right of seizure under Section 10 of the Cattle-Trespass Act as to how long it continues. It was held that :

'The right of seizure under Section 10 only extends within the period the cattle are on the land and it ceases afterthey leave such land. The terms 'trespassing' and'doing damage' appearing in Section 10 are in the present continuous tense and ordinarily they canonly be understood to restrict the right of seizure to the period when the cattleare trespassing and are doing damage. It would amountto stretching the meaning of the language of Section 10 to readtherein the provision for the right of seizure even aftercattle had left the land and ceased to commit

trespass.'

After expressing this view, it was further held that

'The complainant had no lawful right to chase the cattle into the field of the accused, the accused persons has a right of private defence of their property, but that they had exceeded that right when they continued to beat him when the cattle had been rescued.'

Thus there is preponderance of authority in favour of the view taken by the learned Sessions Judge. In a recent case in *Pyarelal Bhargava v. State of Rajasthan*, AIR 1963 SC 1094 their Lordships of the Supreme Court observed that:

'To commit theft one need not take movable property permanently out of the possession of another with* the intention not to return it to him. It would satisfy the definition if he took any movable property out of the possession of another person though he intended to re-turn it later on.'

It was further held that:

'The loss need not be caused by a permanent deprivation of property but may be caused even by temporary dispossession, though the person taking it intended to restore it sooner or later. A temporary period of deprivation or dispossession of the property of another causes loss to the other. That a person will act dishonestly if he temporarily dispossesses another of his property is made clear by illustrations (b) and (l) of Section 378 of the Indian Penal Code.'

7. Therefore, the taking away of the cattle which have not trespassed and caused damage to the crops, to the cattle pound, without the consent of the owner, would amount to theft even though the person taking them may not have the intention of having any wrongful gain to himself. But such taking away would be dishonest because it would mean deprivation of cattle to the owner and consequently wrongful loss to him. That being so, the petitioner had a right of private defence of property.

8. Now the question is whether the petitioners have exceeded that right as found by the learned Sessions Judge. The learned Sessions Judge has observed that there were 17 injuries in all on the person of Rajendra Singh and Mohkamsingh also had one punctured wound on his left fore-arm. He further observed that there were six injuries caused by sharp weapon to Rajendra Singh. The learned Sessions Judge failed to notice that out of the 17 injuries found on the body of Rajendra Singh all had been caused by a blunt object and it was not the prosecution case that the petitioners had inflicted those injuries. Out of the cut wounds injury No. 9 which was a fracture of the right ulna was attributed to Maidekhan petitioner. Injuries Nos. 7 and 8 which were simple in nature were attributed to Saidekhan. In the case of Mohkamsingh the only injury found on his body was attributed to Maidekhan. It has however, to be noticed that Saidekhan petitioner himself also received a cut wound and fracture of radius 2'x4'x5' on the left forearm which was caused with a sharp edged weapon. Dr. Swadesh Mitra Saini (P.W. 4) proved that it was grievous. The learned Sessions Judge also failed to take notice of the injury received by Maidekhan. It is, therefore, obvious that either Rajendra Singh or Mohkamsingh was carrying a sharp weapon with him, which was actually used for causing grievous injury to Maidekhan.

So the petitioners besides having this right of private defence of property had also a reasonable apprehension of grievous hurt being caused to them. Only four injuries have been attributed to the petitioners out of which three were simple and one was grievous. Rajendrasingh and Mohkamsingh had refused to release their flock of sheep which they had illegally seized. In such circumstances it cannot be said that the right of private defence of property and person was exceeded. Besides it is not understandable how Saidekhan was convicted under Section 326 of the Indian Penal Code, Only one grievous injury with a sharp weapon was found on the body of Rajendrasingh and that injury was attributed to Maidekhan. No grievous injury was attributed to Saidekhan. The learned Sessions Judge did not apply Section 34 of the Indian Penal Code to the facts of the case. It is therefore, not clear how he convicted both the petitioners under Section 326 of the Indian Penal Code. Since it has been held that the petitioners had not exceeded the right of private defence of property and person, they are entitled to an acquittal.

9. This revision is, therefore, allowed, conviction and sentence of the petitioners are set aside and they are acquitted. They are on 'tail and need not surrender to it.

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