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Court : Rajasthan

Decided On : Sep-17-1976

Reported in : 1977CriLJ1055; 1976(9)WLN643

Judge : M.L. Jain, J.

Appellant : The State of Rajasthan

Respondent : Pooran Singh and ors.

Judgement :

M.L. Jain, J.

1. The facts of this appeal are that there is a Bakli Dam in District Jalore. The contract of fishing in the said Dam was auctioned in the name of Kalyan Singh complainant on 13-9-1968, According to the Rajasthan Fisheries Act, 1953, and the rules made thereunder, fishing is prohibited from 1st July, to 15th September of each year. Kalyan Singh had deposited one-fourth of the amount but the licence was issued in his name on 24-10-1968. According to the licence, Kalyan Singh was authorised to catch fish in the said tank from 24-10-1968 to 30-6-1969. It is alleged that accused Pooran Singh caught fish in the said tank on 20-9-1968. He along with other co-accused was caught by Kalyan Singh with the help of the Chowkidars., A truck containing 15 maunds of fish was also caught. Jalim Singh Patwari P.W. 6 lodged a report of the occurrence. The police recovered the fish and produced them before the Magistrate who directed them to be destroyed. The

police forwarded 9 accused persons for trial under Section 379, I, P.C. and Sections 6 and 8 of the Rajasthan Fisheries Act, 1953. The plea of the accused was that he had paid Rs. 400/- to Kalyan Singh and it is with his permission that the fish were caught.

2. Neniya P.W. 2 deposed that he told Kalyan Singh that some people have been carrying away fish in the night. On the night of occurrence Neniya, Mangilal, and Kalyan Singh kept a watch. At about 11 p.m. a motor vehicle came and parked near the waters and the accused continued to fish upto 5.00 O'clock in the morning. When the motor was Started for leaving the tank, all the three of them reached there and asked them why they were taking fish. When Neniya asked them not to proceed, then Pooran Singh sat there while Kalyan Singh went in the village. Mangilal P.W. 8 is the government chowkidar on the said tank. When Pooran Singh's party had finished their fishing, he asked them if they had any permit. Pooran Singh replied that he had no permit. Thereupon, Mangi Lal asked them not to carry the fish and detained them. Kalyan Singh P.W. 4 has stated more or less the same facts.

3. The accused also produced six witnesses. Bootia D.W. 1 deposed that Kalyan Singh had come in the hotel of Sardar Pooran Singh and offered a truck load of fish for Rupees 400/-. Pooran Singh gave him Rupees 400/- and then his party went to the tank for catching the fish. Jalim Singh did not allow them to fish after 3.00 a.m. and demanded some bribe. The accused party was beaten and their fish were also carried away by Kalyan Singh's party. The same theory is supported by Gulab Singh D.W. 2 and Roopa D.W. 3 and Anop Singh D.W. 5. Pooran Singh also examined himself as D.W. 4 to support the same facts. The learned Magistrate held that the conduct of the accused is quite the opposite of the conduct of thieves. If they were really stealing fish, then they would not have stopped and remained there when checked by the witnesses. The learned Magistrate relied upon Chand Kumar Das Karamarkar v. Abanidhar Roy : 1965 CriLJ496 . The accused had come to know that the matter had been reported to the police and only two chowkidars were there on the tank. If the accused had any intention of committing theft, they could have escaped in the truck very easily. Moreover, the chowkidars would not have waited for fishing operations for 7 hours

before they came to stop the accused. Though the defence has not been able to prove the payment of Rs. 400/- to Kalyan Singh, yet there was probability of such a contract which is corroborated by the subsequent events and conduct of the parties. It was also proved that the accused had received injuries but the S.H.O. did not get them medically examined. He also did not have the fish weighed. The accused could not therefore be convicted for theft simply because they were seen catching the fish. The learned Magistrate therefore held them not guilty under Section 379 I.P.G.

4. In respect of the offence under the Rajasthan Fisheries Act, 1953, the learned Magistrate observed that even Kalyan Singh was not authorised to catch fish because he had not deposited the full amount and he himself could not have undertaken fishing in the tank on the day of occurrence. The offence under the Rajasthan Fisheries Act cannot be treated separately from the offence under Section 379 I.P.C. There was no reason to disallow the contention that Kalyan Singh had acquired interest in the tank and since it has not been proved that the fish were caught without the consent of Kalyan Singh, the accused could not be held guilty under Sections 6 and 8 of the Rajasthan Fisheries Act.

5. The learned Magistrate, Jalore, by his judgment dated 31-1-1972 eventually acquitted all the accused of all the offences, Hence this appeal by the State. I have heard arguments and examined the record.

6. The learned Public Prosecutor contends that the findings of the learned lower court are erroneous. The accused had themselves admitted in their statement under Section 342, Cr.P.C. that they had taken out fish in the night and were caught on the spot. No consent of the Government or the Thekedar was proved for removal of the fish and in thesis circumstances, the order of the learned Magistrate is perverse and has caused miscarriage of justice.

7. The counsel for the respondent on the other hand defended the verdict of the learned lower court and contended as follows:

(1) The fish are not subject of theft; being *ferae naturae* and incapable of possession;

(2) The evidence does not prove the ingredients of theft, particularly dishonesty on the part of the accused. They believed bona fide that they were carrying the fish they had paid for;

(3) There was no charge of conspiracy and the accused other than Pooran Singh were mere servants and could therefore be not held guilty of theft

(4) Under the Fishing Act, the offences could not be tried in the absence of a complaint by an authorised officer.

7A. Now, so far as the case under Section 379 I.P.C. is concerned, the learned Counsel for the respondent submitted that capture and removal of fish from public waters does not amount to theft. In this connection he relied upon the *Queen v. Revu Pothadu* (1882) ILR 5 Mad 390. In that case, the accused were acquitted under Section 379 I.P.C for catching fish in a creek the right to fishing in which had been leased out by the Government. This decision was based upon the proceedings of the High Court of Judicature at Madras dated 23rd October, 1878, wherein the right of catching the fish in Government tanks had been sold by the Government by auction to persons other than the accused. It was held that the tanks were ordinarily open irrigation tanks and the fish living in reservoirs of this kind are not in possession of any one in such sense as to render their capture and removal from the reservoir as theft. If any right as the right of catching the fish is violated by removing them, the remedy is civil action. But on the other hand in *Queen Empress v. Shaik Adam* (1886) ILR 10 Bom 193, it was held that the tank from which the fish were taken, was apparently an enclosed tank belonging to the municipality, the fish were restrained of their natural liberty and liable to be taken at any time according to the pleasure of the owner and were, therefore, subjects of theft. If the fish were unable to escape from the tank, they were practically in the power and dominance of the prosecutor and conviction under Section 379 I.P.C. was legal.

8. In *Bhagiram Dome v. Akbar Dome* (1888) ILR 15 Cal 388 it was held that no doubt fishery is a right which is recognised as property in this country but the fish in the river cannot be said to be property in the possession of the person who may have the fishery right and infringement of that right is not a criminal offence as

defined in Section 378 of the Indian Penal Code.

9. In *Subba Reddi v. Munshoor AH Saheb* (1900) ILR 24 Mad 81, the complainant had taken the tank fishery on lease and was entitled to sole right of fishing in the tank. He had found the accused catching fish by letting the water to the sluice and spreading nets. Relying upon *Queen v. Revu Pothadu* (1882) ILR 5 Mad 390 it was held that fish in an ordinary irrigation tank are not in the possession of any person so as to be capable of being the subject of theft, nor does the removal of such fish constitute any other offence.

10. In *Haju Chungal Halapoto V. Basarmal Changoomal* (1912) 13 Ind Cas 214 : 13 Cri LJ 22. (Sind) the allegation was that the accused stole fish from Indus and from Dhands connected with the Indus, in respect of which the complainant had received licence to fish, from Government. Since the fish were in open and unenclosed water, they did not fall within the ruling in *Queen Empress v. Shaik Adam* ((1886) ILR 10 Bom 193) which laid down that when restrained of their natural liberty fish are capable of being possessed being no longer *ferae naturae* but *ferae domitae*. The Indian Penal Code no doubt makes no express distinction between animals *ferae naturae* and those that are domesticated. But under the definition of theft the property which is the subject of theft is only movable property which is capable of possession. The very fact that the fish in this case were *ferae naturae*, free to go of their own accord, show's that no one could be in possession of them. In *Kaloo Khan v. Adya Nath Haldar* (1931) 32 Cri LJ 572 : AIR 1931 Cal 358(1) where the fish were able to go in or out of a private fishery, the act of fishing, though followed by removal of fish was held not to amount to theft.

11. In *Re Subbian Servai* (1913) ILR 36 Mad 472 : 13 Cri LJ 38 the accused had removed fish from the government irrigation tank. Following *In re Raghunadha Mahanti*, Cri Rev Case No. 580 of 1909 (Mad) it was held that each case must be decided on the particular facts thereof, and the earlier cases were not universally applicable. Though the capture of fish in an ordinary irrigation tank will not itself amount to theft, yet if the water of the tank becomes so low as not to permit the fish leave the tank, the offence may be committed. The High Court refused to interfere because the water in the tank was so low that the fish could not escape.

12. On the basis of the aforesaid authorities, it was urged that the appellants could not be convicted of theft as the fish in the tank in question were *ferae naturae* free to go in and out of it and there was no evidence that they could not escape. I have considered over this aspect.

13. The common law rule in this respect has been stated in Russell on Crime, 1964 12th edition, Vol. 2, p. 903-5 and 1056-57 according to which larceny may be committed of animals *ferae naturae* if they are fit for food of man, and dead, reclaimed (and known to be so), or confined. Thus, at common law, larceny may be committed of fish confined in a tank or net but not when at their natural liberty in rivers or great waters. Doubts have been raised whether fish in a pond are the subject of larceny may be committed of fish in a pond, if the pond be private enclosed property and of such kind and dimensions that the fish within it may be considered as restrained of their natural liberty, and liable to be taken at any time, according to the pleasure of the owner.

14. To my mind, two questions have to be considered in this regard, one is what is the nature of property in fish and second, whether the fish in a given case are capable of possession.

15. In *Ananda Behera v. The State of Orissa* : [1955]2SCR919 the Supreme Court observed that Section 3(26) of the General Clauses Act defines 'Immovable property' as including benefits that arise out of the land. The Transfer of Property Act does not define the term except to say that immovable property does not include standing timber, growing crops or grass. As fish do not come under that category, the definition in the General Clauses Act applies and as a profit a pendre is regarded as a benefit arising out of land, it follows that it is immovable property within the meaning of the Transfer of Property Act.

16. Now it may be that fish may be regarded as an interest in immovable property under the definition given in Section 3(26) of the General Clauses Act and the Transfer of Property Act. But as far as the offence under Section 379 I.P.C is concerned, the matter will be governed by Sections 22 and 378 thereof which define moveable property, Section 22 I.P.C. says:

22. The words 'moveable property' are intended to include corporeal property of every description, except land and things attached to the earth or permanently fastened to anything which is attached to the earth.

Explanations 1, 2 and 3 to Section 378 I.P.C. are as follows : Expl. 1- A thing so long as it is attached to the earth, not being moveable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth, Expl. 2- A moving effected by the same act which effects the severance may be a theft. Expl. 3- A person is said to cause a thing to move by removing an obstacle which prevented it from moving or by separating it from any other thing, as well as by actually moving it.

17. These provisions in fact clinch the issue. Fish in any water are corporeal property and they become subject of theft as soon as they are separated from the waters, dead or alive, and are moved. Indeed, the matter has been placed beyond doubt by a decision of the Supreme Court in *Chandikumar Das Karmarkar v. Abanidhar Roy*, 1965-1 Cri LJ 496 (SC). In that case the accused were fishing in a tank which was in the possession of the complainant The Supreme Court observed:

Fish in their free state are regarded as *ferae naturae*. But they are said to be in the possession of a person who has possession of any expanse of water such as a tank where they live but from there they cannot escape. Fishes are regarded as being in the possession of a person who owns an exclusive right to catch them in a particular spot known as fishery but only within that spot There can thus be theft of fishing from a tank which belongs to another and is in his possession, if the offender catches them without the consent of the owner and without any bona fide claim of right.

18. In the instant case, it is proved that the waters were not in possession of the complainant Kalyan Singh and he could not claim any exclusive right of fishery in the tank before 24-10-1968. It appears to me that the fish were government property and therefore, capable of being stolen. Section 88 of the Rajasthan Land Revenue Act, 1956, provides that all rivers, streams, nallas, lakes and tanks, all canals and water courses, all standing and flowing water which are not the

property of individuals or of bodies of persons legally capable of holding property, are, except in so far as any rights of such persons or bodies may be established in or over the same and except as may be otherwise provided in any law for the time being in force, and are hereby declared to be, with all rights in or over the same or appertaining thereto, the property of the state. Section 89 of the Act even provides that the rights to all fisheries navigation and irrigation in and from, a river shall vest in the State Government and the State Government shall have all powers necessary for the enjoyment of such a right. It follows from the aforesaid declarations of the State Legislature that the tanks which are not private tanks are the property of the State Government. Moreover, in this case the tank is an enclosed tank and fish cannot come and go out of the tank freely. I therefore, have no hesitation in holding that the fish in the Government tank in question were the property in possession of the Government. Indeed the Government were maintaining chowlddars to keep a watch over persons taking away fish in the Bakli tank constituted an offence under Section 379 I.P.C.

19. The learned Counsel for the respondent next submitted that the evidence of the prosecution witnesses regarding theft is not reliable and the conduct of the accused was not that of thieves. The substance of the evidence has been stated in the beginning of this judgment. The plea of the accused is that they were catching fish against payment of Kalyansingh but they were beaten up and detained. This statement lends assurance to the truthfulness of the prosecution story. Now as to the conduct, reliance is placed upon Chandikumar's case 1965-1 Cri LJ 496 (SG) that without animus furandi no offence of theft can be said to be complete. It was urged that the accused had no guilty intention as they agreed to sit as soon as they were caught and continued to maintain that they were allowed by Kalyan Singh to capture fish against payment. They were catching fish in the night not because they were there to steal fish but fish are caught in the cool temperatures of the night so that they do not begin to rot before they are in the market. This argument has no force because Kalyan Singh could not sell fish on the night of occurrence and the offence was being committed not against Kalyan Singh but against the State Government. Moreover, the learned Magistrate was not satisfied that any payment was made to Kalyansingh. If that is so, as it is, then the accused did not have any bona fide claim in the property, not even the weakest one.

20. The principal accused is no doubt Pooran Singh but his accessories even in the absence of conspiracy are guilty of the offence. They cannot take shelter under a plea that they were mere labourers and had no gain in the fish except their wages. I therefore, reject the second and third contentions of the appellants.

21. As regards the offences under the Rajasthan Fisheries Act, 1953, Section 6 provides that no fishing shall be allowed except under a licence obtainable from such officer or person as may be authorised in that behalf by the State Government. Section 8 provides that a contravention of Section 6 shall be punishable with imprisonment for a term which may extend to three months, or with fine which may extend to Rs. 500/- or with both. Section 9 authorises any police officer to arrest a person without warrant committing any fishing offences, Section 10(2) lays down that no court shall take cognizance of any offence under this Act except on a report in writing of the facts constituting such offence made by a Fishery Officer or Police Officer not below the rank of Sub-Inspector or any other person or class of persons authorised by the State Government in this behalf. The accused admittedly were fishing without a licence as required and therefore, they were liable to be arrested without warrant and a sub-Inspector could lodge a report in writing in any court for their prosecution. The last of the argument is wholly devoid of any basis at all. I am therefore, of the view that the accused were equally guilty under Section 8 of the Rajasthan Fisheries Act, 1953, and the observations of the learned Magistrate in this regard are entirely unsatisfactory.

22. Now the question that arises is whether it is a fit case in which the acquittal should be set aside. It appears to me that the judgment of the learned lower court is misconceived and though the appellate court has got to be slow in reversing a verdict of acquittal, at the same time I find that the view adopted by the learned trial Magistrate is not correct and is contrary to the record. The judgment of the court below deserves to be quashed. But having regard to the circumstances of the case, it appears expedient that the accused be given the benefit of probation. We do not know even how much the value of the fish stolen was. The respondents are not previous convicts and deserve clemency.

23. I therefore, accept this appeal, set aside the acquittal and convict the accused respondents under Section 379 I.P.C. and Section 8 of the Rajasthan Fisheries Act, 1953. But no sentence shall be imposed and instead they shall be released provided each one of them furnishes a personal bond in the amount of Rs. 1,000/- and surety in the like amount to the satisfaction of the learned Magistrate undertaking to appear and receive sentence when called upon so to do within a period of six months and in the meantime to keep the peace and be of good behavior. They are allowed two months' time to file the bonds.

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