

1944

*Present: Wijeyewardene J.*RAMALINGAM, Appellant, *and* NAIR, Respondent.862—*M. C., Point Pedro, 3,748.**Theft—Wrongful gain and wrongful loss—Unlawfully keeping a person entitled to property out of its possession—Penal Code, s. 22.*

The accused was the member of a Maha Jana Sabha the object of which was to prevent the members of his caste from working in the fields of the Vellala caste. The complainant, who was not a member of the Sabha worked in the fields of a Vellala man, whereupon the accused and some others went to the house of the complainant and ordered him to pay a fine of Rs. 25. When the complainant refused to make the payment, the accused entered his house, took Rs. 25 from a box and went away.

*Held*, that the accused was guilty of theft, as he took the money by unlawful means with the intention of keeping the person entitled to it out of its possession.

**A** PPEAL from a conviction by the Magistrate of Point Pedro.

*N. Nadarajah, K.C.* (with him *H. Wanigatunge*), for the accused, appellant.

*G. P. A. Silva, C.C.*, for the Crown, respondent.

*Cur. adv. vult.*

October 25, 1944. WIJEYWARDENE J.—

The accused was convicted on a charge of theft of Rs. 25 and sentenced to undergo one month's simple imprisonment and pay a fine of Rs. 75.

The accused is married to a daughter of a step-brother of Vinasitamby from whose possession the money was taken. The accused and Vinasitamby live at Uduthurai where a Maha Jana Sabha was formed, composed of members of their caste. One of the objects of the Sabha was to prevent members of that caste from cultivating the fields of the Vellalas. The accused was a member of the Sabha, but not Vinasitamby. In March last Vinasitamby worked the field of a Vellala man. Shortly afterwards, the accused went to the house of Vinasitamby with four others, one of whom questioned Vinasitamby why he worked for a Vellala man. Vinasitamby replied that he did not want the permission of anyone to do such work, when those who accompanied the accused "dragged (Vinasitamby) to go to the Committee of the Maha Jana Sabha". Vinasitamby refused to go and "lay on the ground". The accused, thereupon, ordered Vinasitamby to pay a "fine" of Rs. 25 to the Sabha. When Vinasitamby

refused to make the payment, accused entered the house of Vinasitamby and took Rs. 25 out of a box and went away saying " I am taking Rs. 25 and you can do what you like ".

The Magistrate has found the facts, as stated above, proved by the evidence of Vinasitamby and his witnesses. That evidence stands uncontradicted, as no evidence was called by the defence. I see no reason to interfere with the Magistrate's finding on the facts.

The Counsel for the accused argued in appeal that a charge of theft was not maintainable on those facts and relied on *Ponnu v. Sinnatambi et al.*<sup>1</sup> and *Gunasekera v. Solomon et al.*<sup>2</sup>. The Crown Counsel submitted that, in any event, the accused could have been convicted of criminal misappropriation and invited my attention to *Haniffa v. Salim*<sup>3</sup>.

I would approach the consideration of this question of law by examining the relevant provisions of the Penal Code without the aid of the decisions cited by Counsel. Section 366 enacts—

" Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft ".

According to that definition there are five elements which are necessary and sufficient to constitute the offence of theft. They are—

- (1) Dishonest intention to take property;
- (2) The property being movable property;
- (3) The taking out of the possession of another person;
- (4) The taking being without the consent of the person in possession;
- (5) The removal of the property in order to accomplish the taking of it.

It is not disputed that the last four elements mentioned above are present in this case. The only question is whether the accused had a dishonest intention. The answer to this question involves a consideration of sections 21 and 22 of the Code.

Section 22 defines " dishonestly " in terms of " wrongful gain " and " wrongful loss " while sub-sections 1 and 2 of section 21 define " wrongful " and sub-sections 3 and 4 define " gain " and " loss " occurring in " wrongful gain " and " wrongful loss ".

Section 22 reads—

" 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 ".

Section 21 reads—

1. " Wrongful gain is gain by unlawful means of property to which the person gaining is not legally entitled ".

2. " Wrongful loss is the loss by unlawful means of property to which the person losing it is legally entitled ".

3. " A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully ".

4. " A person is said to lose wrongfully when such person is wrongfully kept out of any property as well as when such person is wrongfully deprived of property ".

<sup>1</sup> (1922) 24 N. L. R. 248.

<sup>2</sup> (1923) 25 N. L. R. 474.

<sup>3</sup> (1938) 39 N. L. R. 348.

It follows from sections 21 and 22 that a person acts dishonestly, if he takes property by unlawful means with the intention of *retaining* it or with the intention of *keeping* the person entitled to it *out of its possession*. It is not necessary that such person should have an intention of *acquiring* the property or of *depriving* the other person of it.

Now, in this case, Vinasitamby was not a member of the Maha Jana Sabha and was not, therefore, bound by the rules of that Sabha. The Sabha had no right—and much less the accused as an individual member—to call upon the complainant to defend himself before a meeting of the Sabha or to impose a fine on him. It does not matter even if the intention of the accused was not to derive some personal benefit from his act. The “fine” was clearly illegal and the accused could have had no doubt about it. The cases cited by the Counsel for the accused may be distinguished from the present case on that ground. In *Ponnu v. Sinnatambi et al.* (*supra*) the accused removed some animals from the possession of the complainant in order to compel the payment of a sum that was justly due. In *Gunasekera v. Solomon et al.* (*supra*) it was found that the accused acted only “with the object of causing annoyance” to the complainant and not with the object of causing “an injury in the nature of wrongful loss”. Even if it be assumed, as contended for by accused’s Counsel—though the evidence does not warrant such an assumption—that the accused did not intend to appropriate the money but only to retain it in order to compel Vinasitamby to stand his trial before the Maha Jana Sabha, the accused had a dishonest intention in taking the money, according to the interpretation I place on sections 21 and 22 of the Penal Code.

That interpretation is in accordance with the view taken by the High Courts of Allahabad, Bombay and Madras with regard to the corresponding sections of the Indian Penal Code. The interpretation suggested by accused’s Counsel was adopted by the High Court of Calcutta in *Prosonno Kumar Patra v. Uday Sant*<sup>1</sup> which was however overruled by a Bench of Five Judges in *Queen-Empress v. Sri Churn Churno*<sup>2</sup>. In that case, A, the husband of B, owed some money to C. On A’s death, B went to her brother D taking with her two head of cattle that belonged to A. D was using the animals in ploughing a field when E, the servant of C, came and took away the animals forcibly to C. C detained one of the animals and said he would release it when his debt was paid. E was charged with theft and the High Court convicted him on that charge. In the course of his judgment Petheram C.J. said—

“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”.

<sup>1</sup> (1895) I. L. R. 22 Calcutta 669.

<sup>2</sup> (1895) I. L. R. 22 Calcutta 1017.

Pigot J. who delivered a separate judgment said—

“ 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 ”.

The judgment in *Queen-Empress v. Sri Churn Chungo (supra)* was followed by the Lahore High Court in *King-Emperor v. Bakhtawar*<sup>1</sup> and by the Bombay High Court in *King-Emperor v. Ganpat Krishnaji*<sup>2</sup>.

I uphold the conviction but alter the sentence passed by the Magistrate. I order the accused to pay a fine of Rs. 100 and to be detained in custody till 4 P.M. on the day the sentence is pronounced in the Magistrate's Court. The accused will serve a term of one month's rigorous imprisonment, if he fails to pay the fine.

*Conviction affirmed.  
Sentence altered.*

