(1978) 02 KL CK 0022

High Court Of Kerala

Case No: Criminal Appeal No. 199 of 1977

Challisseril Lonappan Palu		APPELLANT
	Vs	
Janaki Amma and Others		RESPONDENT

Date of Decision: Feb. 28, 1978

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 427, 447, 79, 95

Hon'ble Judges: P. Janaki Amma, J

Bench: Single Bench

Advocate: A.P. Chandrasekharan, for the Appellant; P.V. Aiyappan and P.K. Venugopalan for Respondents 1 to 3 and K. Thankappan, State Prosecutor for Respondent 4, for the Respondent

Final Decision: Dismissed

Judgement

Janaki Amma, J.

The appeal filed by the complainant is against the order of acquittal passed by the Judicial Magistrate of the Second Class-I, Trichur in C.C. 1202/75 on the file of that Court. The complainant is the owner of a property described as Kayyalaparamba. He has planted ''Seemakonna'' trees along the boundary of the property. The first accused is the owner of the paddy field which forms the southern boundary of the complainant''s property. On 18th June 1975 at about 7 a.m. the first accused along with accused Numbers 2 and 3 went to the paddy field. They are alleged to have trespassed into the paramba of the complainant. At the instance of the first accused, accused Numbers 2 and 3 cut away the southern branches of the trees standing on the southern boundary. Even though the complainant protested, the accused did not heed his words. After cutting, the first accused is alleged to have thrown away the branches which fell into her paddy field to the adjoining paramba of the complainant. The complainant''s case is that by the above act, the accused committed offences punishable under Sections 447 and 427 I.P.C. The Trial

Magistrate held that there was sufficient evidence in the case to show that the accused entered the compound of P.W.1, the complainant and that accused 2 and 3 cut the southern branches of 30 ''Seemakonna'' trees standing on the southern boundary of the compound as directed by the first accused. The court, however, held that the overhanging of the branches amounted to nuisance and the accused had the right to abate the nuisance by cutting away the branches which overhung. It was, therefore, held that no offence was committed by the accused. The appeal is preferred challenging the order acquitting the accused.

2. The contention put forward on behalf of the Appellant is that the circumstances of the case do not warrant the finding arrived at by the trial court regarding the guilt of the accused. It is pointed out that the accused had no case when examined u/s 313 Code of Criminal Procedure that what they did was by way of abatement of nuisance. On the other hand, the stand taken by the accused was one of denial of the occurrence itself. It was, therefore, contended that once it is made out that the accused committed the act, they are liable to be convicted for the offences alleged.

3. The fact that the property wherein the trees stood adjoins the paddy field of the first accused is not disputed. The complainant''s case itself is that the trees which were cut stood along the boundary of the complainant''s property and that of the first accused. The case of the complainant is also that the branches that were cut, excepting in the case of two trees, were those overhanging the paddy field of the first accused. The complainant, however, has a case that there were two trees of which not only the branches but also the stems were cut by the accused. P.W.1, the complainant has spoken to this case. The cutting of the branches and also of the stem of two trees is made out by the testimony of the complainant''s witness. Ext. P-1, the scene mahazar prepared by the Sub Inspector of Police also mentions the cutting of the branches of trees and that there were two trees which were cut leaving only a trunk 60 cm. in height. There is thus sufficient evidence to support the case of cutting put forward by the complainant.

4. The denial of the cutting of the trees is unjustified in the light of the evidence available in this case.

5. However, even in the trial court the accused put forward an alternate contention that the cutting in the circumstances made out did not amount to an offence. The argument is that since the evidence in the case made out that the branches of the trees were overhanging the paddy field of the first accused, their existence amounted to nuisance so far as the first accused was concerned and the act of the accused was only abatement of nuisance which the first accused is entitled to in law. If this plea is maintainable in law, the act committed was not an offence and the order of acquittal is only to be confirmed.

6. There can be no doubt that a person who is accused of an offence is entitled in law to put forward even inconsistent pleas, by way of defence. An accused in a

criminal case is not bound by his pleading and it is open to him to spin out a defence even from the admissions made by the prosecution witness or the circumstances proved in the case. See Pratap Misra v. State of Orissa 1977 S.C.C. 447.

7. The evidence in the case is that all the thirty trees were standing on the southern boundary of the complainant''s property and the branches were overhanging the paddy field of the first accused. Excepting in the case of two trees it was the southern branches that were cut. It can be inferred from the circumstances that the primary purpose of the act of cutting was to save the first accused''s paddy field from the shade and other obstruction caused by the trees. No doubt the complainant has a case that the first accused requested for green manure and the request was turned down by him; but there is only his uncorroborated testimony on this point. From the fact that the first accused threw away the branches cut into the complainant''s property, it is clear that her intention was not to make use of them herself. No mens rea as such is proved in the case.

8. Reference may, in this connection be made to the following passage in Salmond on the law of Torts (17th Edition Page 612):

It is lawful for any occupier of land, or for any other person by the authority of the occupier, to abate (i.e., to terminate by his own act) any nuisance by which that land is injuriously affected. Thus the occupier of land may without notice cut off the overhanging branches of his neighbour''s trees, or sever roots which have spread from these trees into his own land. In these cases the abator can act without leaving his own land, but subject to certain requirements as to prior notice, which will be considered later, the right also extends to the cases in which it is necessary for the abator to enter upon the land of the other party. In abating a nuisance any unnecessary damage done is an actionable wrong, and therefore, where there are two ways of abating a nuisance, the less mischievous is to be followed, unless it would inflict some wrong on an innocent third party or the public.

9. In Rangaswami Goundan v. Arumugha Goundan AIR 1936 Mad 702 an interesting question arose whether a person can claim a right by way of easement to have the branches of trees overhanging on the land of another. The claim was negatived. Reference was made to the observation of Lord Justice Kay in (1894) 3 -- Ch. 1 (at page 24):

The encroachment of the boughs and roots over and within the land of the adjoining owner is not a trespass or occupation of that land which by lapse of time could become a right. It is a nuisance.

10. Two other rulings cited on behalf of the Respondents are also on the same point. In Alamparambil Chakkunny Rappai v. Velayudhan and Anr. XXXVIII Cochin Law Reports 93. The accused was prosecuted for cutting the branches and a portion of the stem of a Nesa tree which stood in the boundary line between the property of the complainant and the paddy field of the accused. The acquittal of the accused on

the ground that the act amounted to abatement of nuisance was confirmed in appeal by the High Court.

11. The Identical defence was uphold in Ouseph Thommen v. Joseph Antony 1956 KLT 369 when the accused cut the overhanging branches of a cashew tree belonging to the complainant which stood on the boundary line of their land where he had planted tapioca. Koshy (C.J.) who decided the case also referred to Section 79 of the Indian Penal Code which states that nothing is an offence which is done by any person who is justified by law in doing it.

12. The accused in the instant case were therefore justified in cutting the branches of the trees which overhung the first accused''s property. It is no doubt true that while cutting the branches, the stems of two trees have been cut. But there is no evidence that there was any specific direction by the first accused to cut the main stems of the trees. There is no evidence regarding the extent of damage or whether the act was done by accused 2 and 3 with intention to cause damage or loss to the complainant. From the nature of the trees the cutting of the stem could be accidental or under a mistaken belief that the act was necessary to prevent harm to the first accused''s property. If the harm caused to the complainant was only slight, Section 95 of the Indian Penal Code would apply to the case and no person of ordinary sense and temper would have complained about the act. No criminal intent on the part of accused 2 and 3 is established. At the most, their act amounted only to a civil wrong.

The order of acquittal does not call for interference. The appeal is dismissed.