

(1878) 03 CAL CK 0019

Calcutta High Court

Case No: None

The Empress on the  
Prosecution of  
Denonath Ghattack

APPELLANT

Vs

Rajcoomar Singh and  
Another

RESPONDENT

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Date of Decision: March 27, 1878

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 530
- Penal Code, 1860 (IPC) - Section 23, 425, 99

Citation: (1878) ILR (Cal) 573

Hon'ble Judges: L.S. Jackson, J; Cunningham, J

Bench: Division Bench

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### Judgement

L.S. Jackson, J.

It appears to me in the first instance that the Joint Magistrate was in error in making any order in this matter u/s 530 of the Code of Criminal Procedure. It seems to me that the subject-matter was one to which that section could have no application. There was really no question of possession. The land was in the joint possession of the disputants, and the only question was, whether one of them being a joint owner was at liberty to make use of the land in such a manner as to cause what the other joint owner chose to consider an annoyance, and against the will of that joint owner. In fact, the Magistrate himself, in a passage of his judgment, scorns to furnish an excellent reason why he should not have exercised jurisdiction under that section. Adverting to an argument of the pleader for the accused, as to the right of Coopee Kisto Gossain to forbid this mode of enjoyment, he says: "I am unable to accede to the application of this doctrine. The vakeel says that the doctrine would be monstrous that a co-sharer might build a house upon land held in joint partnership for his sole use," and so on. Then he goes on to say: "The objection does not apply

here, for a nawbut-khana is not a house; it is the flimsiest and most unsubstantial of structures. It occupies the air rather than the earth. It is an elevated platform on which musicians may sit. The grass can grow under it, and goats and cattle graze there." The Magistrate's own argument, therefore, was, that Shama Churn Lahiree, in erecting this nawbut-khana, proposed to occupy the air; and although Section 530 applies to land and water, it certainly does not comprehend the air. I have no doubt that the order u/s 530 was beyond the power of the Magistrate, and ought not to have been made. The Magistrate, however, not only made that order, but has relied upon it in the proceedings now before us, because he has ordered a copy of it to be filed on the record, although it is manifest, from what afterwards took place, that the order had ceased to have any effect whatever, because the result of the order which he made was that Goopee Kisto Gossain, being affected by it, immediately brought a suit in the Civil Court, and that Court declared that the defendant had no right to erect the nawbut-khana in that situation, and in fact decreed that it should be removed. But as an order u/s 530 is only valid until the person to whom possession is given is ousted by due course of law, and as the effect of that judgment of the Civil Court certainly was to oust Shama Churn Lahiree, the order of the Magistrate ought not to have been referred to in any further proceedings. That decree of the Civil Court has not, I understand, been set aside on appeal. But whether it has been appealed or not, and whatever may be the result of such appeal, it is not our business at present to consider the correctness of that decision. Undoubtedly, as far as the parties were concerned, it was a valid decision of a competent Court, and the Magistrate, as well as the parties, were bound to respect it. In respect of what occurred in September 1877, it appears to me that the first conviction by the Deputy Magistrate was erroneous. The accused persons were convicted of mischief by the Magistrate. Now, the definition of "mischief is to be found in Section 425 of the Indian Penal Code" which is this: "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." Now, as far as I can see, the only act done by the accused persons in that case was to change the situation of the bamboos (because they were not otherwise destroyed or injured) in so far as to put an end to their continuance in the form of structure. Then, looking to the words "wrongful loss" as defined in Section 23 of the Indian Penal Code, we have,--wrongful loss is the loss by unlawful means of property to which the person losing it is legally entitled." Now it is clear from the decision of the Civil Court, which was then in force, that Shama Churn Lahiree was not at that time legally entitled to have those bamboos put together in that place in the form of a nawbut-khana, and consequently there was no causing of wrongful loss in the act done by the accused persons. It seems to me, therefore, that if that conviction had been brought before this Court in the exercise of its power of revision, the conviction would have been set aside. But the employer of the accused appears throughout those proceedings to

have been singularly ill-advised. He had an illegal order made against him u/s 530, which was allowed to remain untouched. He brings a suit in the Civil Court, of which he fails to obtain the full effect. His servants illegally suffer conviction of the offence of mischief, and that conviction is also allowed to pass unquestioned. He seems to have been then advised to cover this piece of ground with logs of wood and bricks and other materials, which was undoubtedly an unjustifiable act. His servants being then charged with rioting, it appears that their counsel, instead of simply relying upon the decision of the Civil Court, thought fit to argue before the Magistrate at length as to the question of right. Finally, upon the conviction taking place, instead of going at once to the Appellate Court, the accused were advised to come before this Court--a procedure which, undoubtedly, prejudiced them in the mind of the Sessions Judge, and which has added very much to the cost and anxieties of these proceedings.

2. I am now coming to the particular proceedings which are before us. These petitioners were charged with the offence of rioting. Now, first as to the procedure, it appears to me that the accused were undoubtedly prejudiced by the haste with which the prosecution was pushed on. I am unable to see for what public object this was done, or what was the particular importance of the case to which the Magistrate refers. It seems to have been, in the eyes of the Magistrate, of particular importance that the employer of the accused persons should not gain his object, and from that it seems to result that he thought it of great importance that the complainant should gain his object--that is to say, whatever the result of this prosecution might be, Shama Churn Lahiree, the virtual complainant in this case, should be enabled to erect and keep erected this natchbut-khana for such purposes as he thought desirable; and the Magistrate, in a passage of his explanation, which was submitted to this Court some time ago, says, that on looking back to the proceedings he is unable to see what other course he could have taken. I confess it does seem to me strange, considering that this question had been already submitted to a Civil Court which was competent to entertain it, and that that Court, whether rightly or wrongly, had determined that Shama Churn Lahiree was not entitled to that particular form of enjoyment; it does seem to me strange that it should not have occurred to the Magistrate that the right solution of his difficulty would be to restrain Shama Churn Lahiree from doing that which the Civil Court had decided he was not entitled to do, until, at any rate, a further decision upon the matter should have been obtained.

3. I have now to observe upon the refusal of the Magistrate to allow time to the accused for the appearance of their witnesses. The Magistrate, and I observe also the Sessions Judge, relies upon the alleged discretionary power of the Magistrate in this matter. Now, this being what is termed a warrant case, the duty of the Magistrate in this particular is stated in the 219th section of the Code of Criminal Procedure. That section says;--"The Magistrate shall, subject to the provisions of Section 362, summon any witness, and examine any evidence that may be offered

on behalf of the accused person, to answer or disprove the evidence against him, and may, for this purpose, at his discretion adjourn the trial from time to time as may be necessary." Section 362 says: "In wan-ant cases the Magistrate shall ascertain from the complainant, or otherwise, the names of any persons who may be acquainted with the facts and circumstances of the case, and who are likely to give evidence for the prosecution, and shall summon such of them to give evidence before him as he thinks necessary. The Magistrate shall also, subject to the provisions of Section 359, summon any witness and examine any evidence that may be offered on behalf of the accused person, to answer or disprove the evidence against him, and may, for that purpose, at his discretion, adjourn the trial from time to time." Section 359, to which reference is there made, says: "If the Magistrate thinks that any witness is included in the list for the purpose of vexation or delay, or of defeating the ends of justice," he may require the accused person to satisfy him that there are reasonable grounds for believing that such witness is material, Now, I understand this Section 359 to mean that if, among the persons named by the accused as witnesses to a defence, the Magistrate considers that any particular witness is included for the purpose of vexation and delay, he is to exercise his judgment and enquire whether such witness is material. I have never heard that it was intended by that provision to enable the Magistrate to enquire generally into what the defence of the accused person is to be, and to consider whether, on learning the nature of the defence, he is absolutely to abstain from summoning the whole of the witnesses cited by the accused. I am aware of no warrant for the exercise of any such sweeping authority. Putting that aside, can it be said here that there was any purpose of vexation or delay for which these witnesses were summoned. The trial was proceeding with great rapidity. The offence of which these prisoners were charged was very serious; the law enabled them to call witnesses in order to disprove or answer the case made against them; and considering what the time of the year was at which the first attempt to procure the attendance of these witnesses had been made, it does seem to me that it would have been reasonable to allow a further time for that purpose; and I moreover think it probable that, by reason of such time not having been allowed, the prisoners were prejudiced in their defence, because this was not a simple question, it was one which depended somewhat upon minute considerations. The conduct of the parties, the mode in which one side or the other had acted, was of the greatest importance in determining firstly, whether the accused had committed any offence or not; and secondly, what was the nature and extent of that offence. The Magistrate indeed says, in order to justify his refusal that the accused had confessed that with which they were charged. The accused had confessed no such thing. They were charged with nothing. That which they admitted was that they had pulled up these bamboos and displaced the erection. That was a long way from confessing the offence of rioting.

4. Another point on which I think we are bound to remark is, that the Magistrate, having at his command the means of obtaining evidence which was presumably impartial,--that is to say, the evidence of his own police officers,--did not either call or examine any one of them. The witnesses for the prosecution were, I believe, only two; and I should have expected, in a case like this that the Magistrate should have resorted to the evidence of the police officers as presumably free from having any bias on one side or the other. So far as to the procedure in this case.

5. I now turn to the conviction. The accused have been convicted of the offence described in Section 147 of the Indian Penal Code. After a good deal of consideration, I am unable to satisfy myself that that which they did come under that section. Rioting, according to the Indian Penal Code, consists of force used in the prosecution of a common object of an unlawful assembly. We must, therefore, find that there was an unlawful assembly, that they had a common object, and that forces was exercised in the prosecution of that object. Now, I think it highly probable that, on this occasion, there were five or more persons assembled; but who were these persons? They were not persons assembled together for any unlawful purpose, nor were they persons summoned together for the purpose of committing a breach of the peace. They were the ordinary servants, and probably, relatively speaking, only a few of the ordinary servants of this Baboo Goopee Kisto Gossain. One of them discovers that stealthily the other party had, in the course of the night, put up this structure, which the Civil Court had declared he was not authorized to do, and he calls other servants to assist him in remonstrating, and in removing this structure which was there illegally erected. It was suggested that this matter came either under the third or fourth clause of Section 141. Now, the third clause specifies the object to be that of committing any mischief or criminal trespass or other offence. In regard to mischief, as I have already said with reference to the previous conviction, it appears to me that there was no mischief. In regard to criminal trespass, the allegation appears to me to be absurd. The accused persons were only where they were entitled to be on their master's own land. They had not gone there, nor did they remain there, for the purpose of trespassing or for any other unlawful purpose. Then it is said that perhaps they had gone there for the purpose of enforcing some right or supposed right. It seems to me they had not gone there for any such purpose, but that the other side having gone there for the purpose of enforcing a right which he perfectly knew the Court had adjudged him not to possess, these persons, merely representing their master, went there for the purpose of resisting that infraction of their master's right. It is admitted that no particular force or violence was used and that this was the case might be further inferred from the fact that the police officers who were on the spot saw no occasion to interfere. It appears to me, therefore, that there was no cause for convicting these persons of the offence of rioting, inasmuch as they were not there as members of an unlawful assembly, nor for any unlawful purpose. I think, therefore, that the conviction, as well as the procedure under which the conviction was had,

was illegal, and ought to be set aside.

6. I have only now to make one or two observations upon what had occurred in the Court of Session. The errors into which the Magistrate has fallen are easily explained by the circumstance that he felt himself, whether rightly or wrongly, impressed with the duty of maintaining not only the peace of the district, but also the authority of his own Court, and also by the fact that he had taken a large part in previous transactions which led up to this conviction, and therefore that which he did, although it was, as I think, erroneous, was far from unnatural. But these considerations do not apply to the Courts of Session. The Sessions Judge was an officer of infinitely more experience. He was not affected by the necessity of maintaining the authority of the Magistrate's Court, or by any participation in the previous proceeding, and yet he not merely fails to point out the mistakes which the Magistrate had committed, but he actually goes beyond him in the line which the Magistrate adopted. The Joint Magistrate had certainly shown that he was not slow to vindicate the respect due to his own Court, and he passed what he avowedly considered a severe sentence when he punished the petitioners with rigorous imprisonment for three months. I am quite unable to see upon what grounds, or for what reasons, the Sessions Judge not merely affirmed but doubled that punishment. I think, therefore, that this rule must be made absolute, and the conviction and the proceedings quashed. The proceedings taken by the Joint Magistrate against Goopee Kisto Gossain and Nundo Lall Gossain must accordingly be stopped.

Cunningham, J.

7. I concur in setting aside these convictions. The facts in the case establish that certain co-owners were doing that, in the enjoyment of the common property, which, as between the parties, had been decided by a competent Court to lie, and therefore must be regarded by us as being, illegal,--viz., erecting a platform, the erection of which the Court had forbidden. Therefore, the other co-owners came in, and without violence or unnecessary force, and with no breach of the peace, abate the nuisance by pulling up certain bamboos of which the structure, so far as the building had gone, consisted. For this they have been convicted of being members of an unlawful assembly, and sentenced to three months' imprisonment. This sentence was on appeal enhanced to six months.

8. It appears to me that the accused were merely exercising the remedy familiar to English law of abating a private nuisance. This right is thus described in Stephen's Commentaries, 5th edition, Vol. III, p. 354:

9. The rule was laid down by Lord Denman in *Perry v. Fitzhows* 8 A. & E. 757. In that case a commoner, whose right of pasturage was interfered with by a building erected upon it, came and pulled it down "about the plaintiff's ears" while he and his family were actually in it, and it was held that the serious risk of human life involved, and the consequent imminent danger to the peace had, according to the

analogy of the law of distress, the effect of rendering the plaintiff's act unlawful.

10. In the present case there appears practically to have been no violence and no real danger of any breach of the peace. Indeed, the police were standing by and looking on while the abatement took place; and the act of abatement was, therefore, in my opinion, legal.

11. The same view of the law appears to be reproduced in the Indian Penal Code. "'Mischief" is defined in Section 425, Indian Penal Code, as the causing of any change in property in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, with an intent to cause wrongful loss to any person." And Explanation 2 shows that mischief may be committed by an act affecting property of which the person committing it is joint owner with others. Under this "definition the act of the complainants in erecting the structure was, as I, regard it, mischief.

12. Then, by Section 99, Indian Penal Code, there is a right of self-defence of property, moveable or immoveable, against an act which falls under the definition of "mischief." I do not think that the third exception in Section 99 applies, as the accused had the right to prevent the structure being made, which they could not have done if they had waited to go to the Court for an injunction.

13. The observations of Couch, C.J., in a similar case--*Birjoo Singh v. Khub hall* 19 W.R. Crim. Rul. 66--seem applicable to the accused in this case.

14. Under this view, I think the accused were exercising a legal right of self-defence; consequently, that there was no criminal force, no unlawful assembly, and no riot, and the conviction must be quashed.