1953 *Present :* **Nagalingam A.C.J.**

FONSEKA, Appellant, *and* CHANDRASEKERA (S. I., Police), Respondent

S. C. 893—M. C. Panadure, 29,338

Mischief—Bona fide *vindication of a right*—*Valid defence*—*Penal Code, s. 408.*

Accused was charged with committing mischief by breaking down a wall erected by the complainant two days earlier. The evidence showed that the accused demolished the wall in the *bona fide* belief that it obstructed a public cartway and that there was no spite or malice on the part of the accused.

Held, that the facts did not disclose the offence of mischief.

APPEAL from a judgment of the Magistrate's Court, Panadure.

Colvin R. de Silva, for the 2nd accused appellant.

A. Mahendrarajah, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

September 25, 1953. NAGALINGAM A.C.J.—

This is an appeal from a conviction entered on a charge of committing mischief by breaking down a wall. The facts, as found by the learned Magistrate, briefly are : One J. M. Perera, whom I shall hereinafter refer to as the complainant, for he is the aggrieved party, built what has been indifferently termed a parapet wall or retaining wall close to a house that he had constructed newly and across a path obstructing, not however the entirety of, it. The path was admitted by the complainant himself to be a public footpath, but he also admitted that the path had been used both by carts and cars, though he qualified that statement by saying that carts and cars had been taken along that path with his permission. The complainant had previously unsuccessfully attempted to obstruct the use of the path by carts and cars by putting up a coconut stump. The appellant on that occasion complained to the Headman of the obstruction and as the Headman himself took no steps he pulled out the stump and threw it out and made the path available for use by members of the public. The complainant limited the use of the path to members of four or five houses, which he said were all that were situate on this path, but his witness the Village Headman admitted there were at least twenty-five houses which were served by this path, and that evidence was supported by the incumbent of the Gangatilaka Arama who was called by the defence. There was also evidence led by the defence that cars and carts had been taken along the path without any permission having been obtained from the complainant.

The learned Magistrate has expressed no view on the exercise of the right of user of this path by vehicles, for he took the view that whether the path had been used or not in that manner, that user did not affect the question he had to decide.

On the day in question, the appellant says, he was in a car, and from a distance he saw there was a crowd of about fifty or sixty people on the spot ; he came there and found that a short wall had been erected to a height of about a foot and a half across the path, leaving a gap of two feet and eight inches in the middle, so as to permit of pedestrian but not of vehicular traffic. The Headman was immediately contacted by the appellant and told that there was an obstruction along this road, but the Headman was apathetic. The appellant says that he thereupon informed the Headman that he proposed to remove the obstruction on the path and then proceeded to demolish it with the assistance of certain other persons, who had been charged along with him.

The question that arises is whether it can be said that in these circumstances the appellant committed the offence of mischief, having regard particularly to the question whether in causing the destruction of property he either intended to cause wrongful loss or damage or that he did so with knowledge that he was likely to do so.

That there can be neither such intention nor knowledge when the right in the exercise of which an act of alleged mischief is done is itself the subject of dispute and when the act that is done is itself in vindication of a right has been accepted by our courts—*Hendrick Sinno v. Engo Nona*[1]. Pereira J. also laid down in the case of *Porolis v. Romanis*[2] that " it is only where a person wantonly acts that he can be said to be guilty of mischief. In other words, as observed above, he should act spitefully, maliciously or wantonly."

If these principles are applied to the present case, it would be found that far from acting wantonly, spitefully or maliciously in order to cause wrongful loss or damage to the complainant, the act that the appellant did was for the purpose of restoring a right of path which had been in use for several years and which had been unlawfully obstructed by the complainant.

The learned Magistrate has asked the question whether it would be proper for a party to take the law into his own hands, and whether in circumstances such as these he should not resort to proper legal remedy. In regard to this the question may well be asked as to what the position would be if as a result of a civil action between the parties it be held that the path was a public cartway and that the complainant has no right to obstruct it. Would it then be proper to punish the appellant for what the law ultimately decides—that he as a member of the public could not have been prevented from using the cartway. While it is a sound principle that a man should not be allowed to take the law into his own hands, that principle must not be regarded as of universal application in every manner of circumstance. It has its own limitations.

[1] *(1914) 1 Cr. App. Reports 21.* [2] *(1913) 2 C. A. C. 163.*

For instance, if a person found his gate opening on to the road barricaded, I think there cannot be the slightest doubt that he would be entitled to break down the barrier in order to get on to the road. It could not in those circumstances be said that he could not break down the barrier but that he must resort to other means to get out of his premises, even to make a complaint.

I find, however, one case which is very similar to the present, and that is the case of *Mohideen v. Suppramaniam Chettiar et al.*[1] decided by Fernando A.J. There a wall constructed by the complainant preventing access to a latrine was broken down by the accused. The conviction in that case was set aside on the ground that the facts did not disclose the offence of mischief.

In the present case, too, it cannot be said that the accused intended to do more than to assert a *bona fide* right of path which the members of the public had been in the habit of exercising for a number of years by removing an obstruction erected a couple of days anterior. There is nothing in the evidence to indicate that the demolition took place as a result of any spite or malice on the part of the appellant.

I therefore set aside the conviction and acquit the accused. Acting in revision I set aside the convictions of the other accused too in these proceedings and acquit them.

Appeal allowed.