

1934

*Present : Dalton J.*THE KING *v.* FERNANDO.39.—D. C. (*Crim.*) Kalutara, 5,540.

*Dishonest removal of property—Removal of goods by tenant—Action by landlord for recovery of arrears of rent—Penal Code, ss. 22 and 407.*

Where the accused, a tenant of the complainant, removed goods from the rented premises, pending an action for the recovery of arrears of rent, and prevented the complainant from exercising his lien,—

*Held*, that the accused had not dishonestly removed any property within the meaning of section 407 of the Penal Code.

**A** PPEAL from a conviction by the District Judge of Kalutara.

L. A. Rajapakse (with him D. J. R. Gunawardene), for accused, appellant.

M. F. S. Pulle, C.C., for Crown, respondent.

*Cur. adv. vult.*

September 7, 1934. DALTON J.—

The appellant has been convicted on a charge of dishonestly removing certain furniture and goods belonging to himself from premises at No. 5 (1) A, Station road, Kalutara, contrary to the provisions of section 407 of the Penal Code.

The facts found are as follows. The premises in question were rented on March 31, 1933, to the accused by the complainant, the owner of the premises, on a monthly tenancy of Rs. 30 a month. The accused carried on there a business in motor tyres and motor accessories. He got in arrears with his rent, and on June 10 complainant sued him to recover Rs. 90. Accused filed answer admitting liability in the sum of Rs. 60, but raised a question as to jurisdiction. The case was tried on July 31 and judgment was delivered in complainant's favour on August 4. Meanwhile on July 18 accused removed his goods from the premises. The evidence shows he did so at night and never told the complainant, whom he saw earlier that day, that he was going to do so. Complainant's claim is that he had a lien for his rent over the goods and he complained to the Police of this removal of goods on July 27. As a result this charge of dishonestly removing his property on July 18 was brought against the accused.

On the evidence and the conclusions of the trial Judge thereon there can be no doubt about the dubious and shady conduct of the accused in removing his goods as he did. The question, however, to be decided is not whether the conduct of the accused was morally wrong, but whether he dishonestly removed his property within the meaning of the Penal Code.

The Code enacts in section 22 that 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. "Wrongful gain"

is defined in section 21 as gain by unlawful means of property to which the person gaining is not legally entitled. Here the accused was legally entitled to the property as owner and he was also entitled to be in possession of it. "Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled. It is urged here by Crown Counsel that wrongful loss was caused to the complainant, and caused intentionally, because he was legally entitled to the property removed. There is no evidence to show, however, he was legally entitled to the property in any way, but that he was merely entitled to a lien over the property at the time of the removal. It is to be noted there was no sequestration or attachment of the property on the premises by him nor was there any distraint.

I think that one may obtain assistance in this case from an examination of the law on the subject of theft, as defined by section 366 of the Code. A man may be in certain circumstances guilty of the theft of his own property. This matter is dealt with by Gour, *Indian Penal Code, Vol. II. (3rd ed.)*, p. 1862, when dealing with section 378 of that Code. He points out that the cases cited in the illustrations, which are only two out of the many by which the offence may be illustrated, depend upon the principle that though the goods belong to the accused, it must be established that at the time of taking they were in lawful possession of another.

The learned commentator then goes on to point out there can be no theft if the possession of the person from whom the owner took possession was not legal, and he cites a case of illegal distraint. Even if there had been attachment of property in a case where the attachment vested possession in the attaching officer, it does not necessarily follow that the owner is guilty of theft in retaking his property. It depends upon the circumstances. He then continues (at p. 1865) that the attachment of an ordinary Civil Court does not have the effect of divesting the owner of legal possession, but merely prohibits a transfer by the judgment-debtor. If in spite of the order he does transfer his property, he does not commit theft, though "he may possibly be guilty of an offence under section 424 of the Code". That section is the same as section 407 of our Code. Had there been any attachment of the property in question, here is an opinion to the effect that appellant may possibly have committed the offence charged. The opinion is, however, not expressed in any very decided terms, whilst later it is to be noted that Sir Hari Gour states at p. 2164 that section 424 must be strictly construed, for otherwise it is likely to trench upon a number of cases which are the fit subject for civil adjudication only.

In the present case, as I have pointed out, there has been no sequestration or attachment. There was merely the existence of a lien upon which the complainant relied. On the facts proved here, I am of opinion that there is no evidence to support a finding that wrongful loss, within the meaning of the Penal Code, was caused or intended to be caused to the complainant by any act of the accused.

A further question as to whether the accused used "unlawful means", within the meaning of section 21 of the Code, would remain to be decided, had my opinion on the first point been different. On this question Gour in his commentary states that the term "unlawful means" is the same

as "illegal means", as defined by section 43 of that Code. The equivalent section of our Code is section 41. The question, however, does not arise here for decision in view of my finding on the first point that the Crown has not established that accused acted dishonestly, within the meaning of the Penal Code.

The appeal must therefore be allowed, the conviction being quashed.

*Appeal allowed.*

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