

1944

Present: Keuneman J.

NAGARAJA *et al.*, Appellants, and CANAPATHIPILLAI, Respondent.

1,044-1,050—M.C. Kayts, 4,339.

Mischief—Reaping of paddy crop—Complainant's possession of field—Penal Code, s. 408.

Where the accused entered a field, which was in the possession of the complainant, and reaped the paddy which, but for the intervention of the Vidane, they would have carried away,—

Held, that the reaping of the crop amounted to mischief within the meaning of section 408 of the Penal Code.

A PPEAL from a conviction by the Magistrate of Kayts.

N. Nadarajah, K.C. (with him *H. W. Thambiah* and *Ragupathy*), for accused, appellants.

L. A. Rajapakse, for complainant, respondent.

Cur. adv. vult.

June 30, 1944. KEUNEMAN J.—

The accused were charged with criminal trespass with intent to commit mischief, under section 433 of the Penal Code, and with committing mischief, under section 409. They were convicted on both counts and now appeal.

The evidence accepted by the Magistrate is that the complainant and his predecessors had been in possession of the field in question. The complainant had the field sown. The accused entered on to the field and cut the paddy. A short time later the Kirama Vidane intervened and took charge of the paddy.

There had been previous litigation as regards the land, which had gone in favour of the predecessors of the complainant, and the accused well knew that the field was in the possession of the complainant. Two points were argued in appeal.

(1) It was contended that an illegality existed in the proceedings. When the complainant came into court and asked for process, he led the evidence of three witnesses, viz., himself, the Kirama Vidane, and Amarasingham Ponnambalam. After process was issued the evidence of A. Ponnambalam was not read, nor was he tendered for cross-examination, and the complainant tendered the other two witnesses only. Further, a complaint made to the Police by A. Ponnambalam (C 2) was read in evidence. I think there has been an irregularity but not an illegality. The Magistrate has made it abundantly clear that he depended on the evidence of the complainant and the Kirama Vidane alone, and not on that of A. Ponnambalam. The evidence of the two witnesses who were tendered for cross-examination amply justified the finding of the Magistrate, whose opinion was not affected by the evidence of A. Ponnambalam or by his alleged statement. I am satisfied that there has been no miscarriage of justice, and I see no reason to interfere with the finding of the Magistrate.

(2) It is contended that the offence of mischief has not been made out, and that this affects the convictions on both counts. I have been referred to certain Indian cases.

In *Mohamed Foyaz v. Khan Mahomed*¹ in the reference to the High Court, the following passage occurs:—

“ To cut a crop which is grown to be cut is not to destroy it or to affect it in the manner defined above (*i.e.*, under the section). The taking may cause wrongful loss to the grower, and if it be dishonest a conviction may be had for the theft. But it cannot be mischief.”

This view appears to have been accepted by Kemp J. There were, however, other grounds on which the decision could rest. So also in *Shakur Mahomed v. Chunder Mohun Sha*² where these words occur in the reference: “ Now as bamboo is a thing that is grown to be cut, the cutting and removing it does not amount to its destruction or other injury defined above ”—and this apparently was concurred in by Kemp J. Here again there was a general concurrence with regard to a number of points raised.

This latter decision is open to doubt because, when the case was cited later to the same Bench, Glover J. said—“ We have no doubt that where a party whose land (as he says) is given possession of to another under a sale in execution by a civil court, and who at the time of attachment made no objection . . . and who since has taken no legal steps to enforce his alleged right does, if he enters upon the land, possession of which has been formally made over to the execution purchaser, and cuts down bamboos growing up on it, commit the offence of mischief ”—*Sonai Sardar v. Bukhtar Sardar*³.

In *Ragupathi Aiyar v. Narayana Goundan*⁴ Curgenvem J. followed the case in 21 W. R. 38, and said that the words of the section “ carry

¹ 18 W. R. Cal. 10.

² 21 W. R. 38.

³ 25 W. R. 46. Cal.

⁴ 52 Mad. 151.

the implication that something should be done contrary to the natural use and serviceableness of such property". The later case in 25 W. R. 46 was not cited.

In another case, the report of which I have been unable to obtain,—*Mirus Chowkidar*¹, it was held that if crops were cut when immature, the offence may be committed.

It is interesting also to consider the case of *Juggashwar Dass and other v. Chatterjee*². Here the complainant had for purposes of removal placed certain goods upon a cart, and accused came and unyoked the bullocks and turned the goods off the cart on to the road. It was held that the offence of mischief had been committed. "There was an unlawful removal of goods from the cart, and an unlawful change in their situation, with the knowledge that the change must amount to an inconvenience, more or less serious, to the owner of the goods, and must to some extent diminish the utility of the goods We think it is not necessary that the damage required by this section should be of a destructive character. All that is necessary is, that there should be an invasion of right and diminution of the value of one's property by that invasion of right, which must have been contemplated by the doer of it when he did it".

The terms of section 408 are as follows:—

"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'."

In the present case it is clear that the accused were well aware of the fact that the complainant and his predecessors were in possession of the field. The Magistrate has held that this attempt on the part of the accused was part of a policy to try to get into possession as soon as a new owner appeared on the scene. The accused acted dishonestly in making the attempt. The accused entered on to the field and reaped the paddy, and but for the intervention of the Kirama Vidane would probably have carried the crop away. The reaping of the crop, in my opinion, cause a change in the property—there was not only a physical change but even a legal change. There has also been a change in the situation of the property. There must have been at least inconvenience caused to the complainant. No doubt the property was not destroyed, but I think it follows that there was a diminution in its value or utility to the complainant.

I prefer to follow the cases reported in 25 W. R. 46 and in 12 Cal. 55 (see also *Gamirulla Sarkar v. Narayana*³). In my opinion the offence of mischief has been established.

The appeals are dismissed.

Affirmed.

¹ 7 C. W. N. 178.

² 12 Cal. 55.

³ 10 Cal. 408.