SUPREME COURT.

† S.C. 1949

June 6.

HAKIM AND TWO OTHERS (APPELLANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

Penal Code, ss. 76 and 79—Notice by Municipality under s. 120 of Burma Municipal Act to repair roof of tenanted house—Failure to repair punishable under s. 202 (b) of the Act—Trespass to the premises without notice to tenants—Removal of a portion of roof—Debris falling inside house—Damage caused—Conviction for house trespass and mischief and abetment—Ss. 235 (1) and 403 of the Code of Criminal Procedure.

A notice to effect some repairs in a tenanted building was served on the owner of the property under s. 120 of the Burma Municipal Act under which such notice could be served either on the Owner or the occupier. Failure to carry out the requirement of the notice was punishable under s. 206 (*b*) of the Burma Municipal Act. The owner did not do anything for a considerable time and then engaged a person to effect the repairs. The owner or the Contractor did not give any notice or intimation to the tenants occupying the building. The Contractor and owner's son, without permission of the tenants gained access to the roof of the building and removed certain sheets of corrugated iron and as a consequence debris fell to the premises occupied by the tenants and some damage was caused to their foodstuff, crockery and furniture ; the owner, his son and the Contractor were then prosecuted by each tenant in two different cases and were convicted.

It was contended that in view of the provisions of ss. 76 and 79 of the Penal Code the accused were not guilty.

Held : That s. 76 applies to an act committed by reason of mistake of fact and not a mistake of law, by a person, who in good faith believes that he is bound by law to do it. S. 79 applies to an act done by a person who, by reason of a mistake of fact (not by mistake of law) in good faith believes himself justified by law in doing it.

The distinction between s. 76 and 79 is that in the former the person *bona fide* believes himself to be bound to do it and in the latter he *bona fide* believes himself to be justified by law in doing it.

The distinction is between the real or supposed legal obligation and real or supposed justification in doing a particular act. Under both these sections there must be *bona fide* intention to advance the law. The party accused cannot allege generally that he had a good motive. He must allege specifically under s. 76 that he believed in good faith that he was bound to do it as he did, or under s. 79 that being empowered by law to the best of his judgment exerted in good faith.

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* Criminal Appeal Nos. 2 and 3 of 1948.

† *Present :* SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE KYAW MYINT and U SAN MAUNG, J.

Queen-Empress v. *Nga Myat Tha and Nga Po Kin*, (1872—92) S.J.L.B. 164 ; *Niamat Khan and others* v. *The Empress*, (1883) P.R. Criminal 29 ; *Chaman Lal* v. *The Crown*, (1940) I.L.R. 21 Lah. 521 ; *Emperor* v. *Ramlo and others* A.I.R. (1918) Sind 69=19 C.L.J. 955 ; *U San Win* v. *U Hla*, A.I.R. (1931) Ran., 83, referred to.

If the owner was prosecuted for the act or acts of executing the repair, s. 76 would be a complete answer to such a charge. But the owner was bound by law to execute the repairs ; but his son, and the employee, did not believe themselves to be bound to commit the offence of Criminal Trespass and mischief. The owner had time before he instructed the Contractor to carry out the repairs, and he could have come to some arrangement with the tenants to carry out the same without causing any trespass or damage to them. In any case the accused were not under any mistake of fact. If there was any mistake—it was a mistake of law. The mistake could not have been made in good faith as the Appellant did not exercise due care and attention as required by s. 52 of the Penal Code. Dismantling of the roof of the building in actual physical possession of tenants without giving them reasonable opportunity to remove their properties, cannot be said to be an act done with due care and attention or in good faith.

S. 235 of the Code of Criminal Procedure is permissive and permits a Court to try together more than one offence so connected together so as to form part of the same transaction. There is nothing in law to prevent a person who has committed more offences than one from being tried separately for each of the offences.

Where a person, by his act, causes wrongful loss and damage to the properties in two separate premises, he can be convicted for two different offences and conviction for injury to one person cannot be a bar under s. 403 to conviction for the offence against the property of another.

Ganesh Sahu v. *Emperor*, (I.L.R. 50 Cal. 594), referred to.

The opinion of Cunliffe J. in *Yeok Kuk* v. *King-Emperor*, I.L.R. 6 Ran. 386 regarding the definition of a distinct offence is too broad though on the facts of that case the case was correctly decided. The test is not whether the offences were connected, but whether they are distinct offences.

C. H. Campagnac for the appellant.

Ba Sein (Government Advocate) for the respondent.

The judgment of the Court was delivered by

MR. JUSTICE KYAW MYINT.—This judgment covers two connected appeals, namely, Criminal Appeals Nos. 2 and 3 of 1948, which have been heard together. The appellants are the same in each appeal, and the facts are now not in dispute.

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The 3rd appellant Hajee Abdul Samad is the owner of a one-storeyed building of some antiquity situate in B Road, Mandalay. The building is divided into two parts, each of which is let to a tenant. One portion is in the occupation of Musa Kaka, the complainant in Criminal Regular Trial No. 92 of 1947 of the Court of the 8th Additional Magistrate of Mandalay, while the other is in the occupation of Abdul Shakoor, the complainant in Criminal Regular Trial No. 93 of 1947 of the same Court. Both these tenants carry on the business of teashop-keepers in their respective premises.

Some time prior to the commission of the acts complained of, the 3rd appellant was served with a notice by the Chief Executive Officer, Mandalay Municipality, requiring him to execute repairs to the roof of the building above mentioned, which was in a dangerous condition. This notice appears to have been one under section 120 of the Municipal Act. Such a notice can be served on either the owner or the occupier of a building, and under section 202 (*b*) of the said Act, the person on whom the notice is served is liable, upon failure to comply with the direction contained therein, to suffer the infliction of a fine which may amount to Rs. 100.

The 3rd appellant engaged the services of the 1st appellant Hakim, a contractor, to carry out the necessary repairs. The 2nd appellant Ba Chit *alias* Abdulla is the son of the 3rd appellant.

On the 4th February 1947, the 1st and 2nd appellants, accompanied by some workmen, without notice to, and without the permission of, the tenants, entered the premises occupied by Musa Kaka, gained access to the roof of the building, and caused four sheets of corrugated iron, which formed part of the roof, to be removed. Upon a report being made to the

police, the work of dismantling the roof was stopped at the instance of the police. As a consequence of the removal of the corrugated iron sheets, some debris fell inside the premises respectively occupied by Musa Kaka and Abdul Shakoor and some damage was thereby caused to foodstuffs, crockery and furniture in those premises.

The appellants were prosecuted and have in Criminal Regular Trial No. 92 of 1947 been respectively convicted of the offences of house-trespass, abetment thereof, mischief and abetment thereof. These proceedings were in respect of the premises occupied by Musa Kaka. In Criminal Regular Trial No. 93 of 1947, they have been respectively convicted of the offence of mischief and abetment thereof. The latter proceedings were in respect of the premises occupied by Abdul Shakoor.

Applications for revision made to the High Court, being Criminal Revision Nos. 94B and 95B, have been dismissed.

It is contended on behalf of the appellants that the acts complained of do not amount to offences in law. In the memoranda of appeal, reliance is placed on sections 79 and 81 of the Penal Code, but in Court the learned Counsel for the appellants referred only to section 79 presumably because section 81 obviously has no bearing on the cases before us.

It is also contended that, having been convicted of various offences in Criminal Regular Trial No. 92, the appellants cannot be convicted of any offence in Criminal Regular Trial No. 93, inasmuch as the acts complained of in the latter trial arose out of the same transaction.

Learned counsel however did not, either in the memoranda of appeal or in argument, mention

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section 76 of the Penal Code. Sections 76 and 79 of the Penal Code are in the following terms :

"76. Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law to do it.

Illustrations.

(*a*) **A**, a soldier, fires on a mob by the order of his superior officer, in conformity with the commands of the law. **A** has committed no offence.

(*b*) **A**, an officer of a Court of Justice, being ordered by that Court to arrest **Y**, and, after due enquiry, believing **Z** to be **Y**, arrests **Z**. **A** has committed no offence.

* * * * *

79. Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law, in doing it.

Illustration.

A sees **Z** commit what appears to **A** to be murder. **A** in the exercise, to the best of his judgment, exerted in good faith of the power which the law gives to all persons of apprehending murderers in the act, seizes **Z** in order to bring **Z** before the police authorities. **A** has committed no offence, though it may turn out that **Z** was acting in self-defence."

These two sections of the Penal Code are clearly worded and the illustrations are sufficient to dispel any doubts that may exist as to their meaning. In respect of section 76 there is no dearth of authority, but the words "justified by law" in section 79 do not appear to have been the subject of judicial consideration in more than a few reported cases.

Although the learned counsel for the appellants has not relied on section 76 of the Penal Code, the case he presents on behalf of the appellants appears to be

based on both sections 76 and 79. His case, in fact, is that the 3rd appellant, having received a notice from the Chief Executive Officer of the Mandalay Municipality requiring him to execute repairs to the roof of the building referred to above, was bound by law to comply with that notice, and, further, that the acts committed by the three appellants were justified in law because the said acts were committed while they were complying with the said notice.

In our opinion, this case is founded upon a misconception. It is true that the 3rd appellant was bound by law to carry out the repairs ordered by the Chief Executive Officer and that the other appellants were carrying out his instructions, and, if they were being prosecuted for the act or acts of executing the repairs, section 76 would doubtless furnish an answer to the charge or charges. But the charges against them are of trespass and mischief, and abetment thereof, and it is no answer to these charges to say that, because the 3rd appellant was bound by law to execute the repairs, all the appellants were bound by law to commit acts amounting to the offences of trespass or mischief or abetment thereof. Nor would section 79 provide an answer to the charges against the appellants, for there can be no justification by law of the said acts.

Neither the learned counsel for the appellants nor the learned Government Advocate has cited any authorities before us in this connection but we have considered the effect of the decisions in the cases mentioned hereinbelow.

In *Queen-Empress* v. *Nga Myat Tha and Nga Po Kin* (1) a first-class constable verbally ordered two police constables to arrest bad characters on a certain

(1) (1872—92) S.J.L.B. 164.

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road and to fire on them if they offered resistance. The constables challenged two men and when they did not stop fired on them, killing one of them. The Sessions Judge acquitted the accused, holding that as they appeared to have acted in accordance with an order issued to them, they were "excusable of all fault" under section 76 of the Penal Code. On appeal it was held that the said section did not apply as the mistake made by the accused was a mistake of law which was not a defence.

In *Niamat Khan and others* v. *The Empress* (1) the four accused were a Naik and three Sepoys of an Indian regiment. The Naik, and the three other accused under his direction, fired upon a mob which was threatening them under circumstances which did not confer upon them the right of private defence. It was contended on behalf of the three Sepoys that, having fired by order of their commanding officer, the Naik, they were protected from punishment by section 76 of the Penal Code. It was however held that that section was inapplicable to the circumstances of the case as the Sepoys were cognizant of all the circumstances of the quarrel and, there being no room for a mistake of fact, they must be taken to have known that the Naik was wrong in law in firing upon the mob and that they were not bound to obey his illegal order.

In *Chaman Lal* v. *The Crown* (2) four convicts in a prison refused to work, alleging that they were unfit, and were sent to the punishment cells. On the following morning Chaman Lal, Deputy Superintendent of the Jail, together with convict officers, went to the cells and severely beat the delinquent convicts. This caused four other convicts to go on hunger-strike.

(1) (1883) P.R. Criminal 29. (2) (1940) I.L.R. 21 Lah. 521

Chaman Lal and the other accused took these convicts to the punishment cells and on the way beat them so severely that two of them died. It was contended on behalf of the accused other than Chaman Lal that they had acted under the orders of their superior officer and that they were therefore protected by the provisions of section 76 of the Penal Code. The contention was not accepted, Young C.J. holding that all the accused knew that they were engaged in an unlawful act and there was no question either of a mistake of fact or of law, or of good faith, as all of them must have known that the beating of convicts was contrary to law.

In *Emperor v. Ramlo and others* (1) where a Hindu husband accompanied by several associates forcibly entered the house of a third person and took away by force his married wife from there against her will it was held that, although it was the duty of a wife to reside and cohabit with her husband, the husband had no right to use force to enforce his rights even when the wife's refusal to live with him was without any reasonable cause, and the husband and his associates could not be justified by section 79 of the Penal Code.

In *U San Win* v. *U Hla* (2) an advocate, acting under alleged instructions from his client, wrote a letter to a magistrate asking him to return a bribe alleged to have been given to him. In his letter the advocate threatened the magistrate with legal action in the event of his failure to comply with the demand and promised to hush up the matter if the demand was met. The advocate was prosecuted on charges of defamation and extortion and upon application being made to the High Court for the quashing of the proceedings it was held that section 76 of the Penal Code had no application to the case as there was no question of any

(1) A.I.R. (1918) Sind 69=19 Cr.L.J. 955. (2) A.I.R. (1931) Ran. 83.

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mistake of fact on the part of the advocate. It was also held that section 79 had no application as the advocate was not justified by law in making the demand.

In Ratanlal's Law of Crimes (1) the learned authors say :

" The distinction between section 76 and this section (79) is that in the former a person is assumed to be bound, and in the latter to be justified, by law; in other words, the distinction is between a real or supposed legal obligation and a real or supposed legal justification, in doing the particular act."

The learned authors then reproduce a passage from the first Report on the Penal Code by the Indian Law Commissioners, 1846, which is in the following terms :

" Under both (these sections) there must be a *bona fide* intention to advance the Law, manifested by the circumstances attending the act which is the subject of charge; and the party accused cannot allege generally that he had a good motive, but must allege specially that he believed in good faith that he was bound by Law (s. 76) to dolas he did, or that being empowered by Law (s. 79) to act in the matter, he had acted to the best of his judgment exerted in good faith."

With regard to the words "justified by law" in section 79, the learned authors say :

" This phrase is used in its proper and strict sense in reference to something needing to be vindicated as being in conformity with law."

In the cases before us, it appears that, after the receipt of a notice under section 120 of the Municipal Act, the 3rd appellant allowed a considerable period of time to elapse before he instructed the 2nd appellant to carry out the repairs. He could during that period

(1) (1945) 16th Edn., p. 146.

have come to some arrangement with the tenants which would enable him to carry out the repairs without causing annoyance to them or damage to their property. On the contrary, he did not even give them notice of his intention to have the repairs executed.

Further, it would be impossible to contend that the appellants were labouring under a mistake of fact, for, if they were acting under any mistake, it could only have been a mistake of law. In any event, the mistake could not have been in good faith, as upon the evidence on record it cannot be held that the appellants exercised due care and attention as required by section 52 of the Penal Code. No reasonable person would have begun the work of dismantling the roof of a building in the actual physical possession of tenants without giving them reasonable opportunity of removing their property to a safe place, especially when, as in these cases, the tenants were teashop-keepers whose property was liable to be damaged by falling debris. There is moreover evidence on the record to indicate that there was ill-feeling between the 3rd appellant and his tenants over the matter of heavy arrears of rent.

With regard to the second contention, which is based on section 403 of the Criminal Procedure Code, the learned counsel for the appellants relies on the cases of *Ganesh Sahu* v. *Emperor* (1) and *Yeok Kuk* v. *King Emperor* (2).

In the first case, Ganesh Sahu was prosecuted in respect of some only of certain articles of property found in the room occupied by him, the room being part of his father's house. He was convicted under section 411 of the Penal Code but was acquitted on appeal. He was subsequently tried and convicted in respect of other properties found in his room on the same date. There was evidence that the different

(1) I.L.R. 50 Cal. 594. (2) 6 Ran. 386.

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articles, which were the subject of the charges in the two trials, were stolen from different persons, but there was no evidence that they were received at different times. It was held by Newbould and Suhrawaddy JJ. that the second trial was illegal under the provisions of section 403 of the Criminal Procedure Code.

In the second case, Yeok Kuk was first prosecuted for offences under the Burma Forest Act. Out of six charges made against him, four were withdrawn by the prosecution, and he was acquitted of the the remaining two. Subsequently, he was prosecuted afresh under sections 379 and 411 of the Penal Code. It is not expressly stated, but is clear from the trend of the judgment as reported, that the charges in the second trial were in respect of the same timber as in the first trial. Cunliffe J. held that the plea of *autrefois acquit* was available to the accused and quashed the proceedings in the second trial.

The cases before us are easily distinguishable from the cases cited above. It is to be observed that there is no conviction for house-trespass or abetment thereof in Criminal Regular Trial No. 93 of 1947.

The material portion of section 403 of the Criminal Procedure Code which requires consideration here runs as follows:

"(1) A person who has been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237.

(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him in the former trial under section 235, sub-section (1)."

Section 235 (1) of the Criminal Procedure Code is as follows :-

"If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence."

Section 235 (1) is merely permissive and appears to have been enacted to meet a possible plea of misjoinder of charges. There is nothing in law to prevent a person who has committed more offences than one in the course of the same transaction from being tried separately for each of the offences.

By the acts of the appellants, wrongful loss or damage to property was caused in two separate premises, and we see no reason why the appellants should not have been convicted of the offence of mischief or abetment thereof separately in respect of the property in each of the premises.

It is to be noted that in *Ganesh Sahu* v. *Emperor* (1) there was no evidence that the different articles, which were the subject of the charges in the two trials, were received at different times. Had such evidence been available, there can be no doubt that the second trial would not have been illegal.

We observe also that in *Yeok Kuk* v. *King-Emperor* (2) Cunliffe J. while discussing the meaning of the words "distinct offence" in sub-section (2) of section 403 of the Criminal Procedure Code, states, at page 389 of the report :

' By ' distinct offence ' I apprehend the plain meaning of the section to be that it must be an offence entirely unconnected with a former offence charged."

While we have no doubt that upon the facts of the case before him Cunliffe J. arrived at a correct

(1) I.L.R. 50 Cal. 594. (2) 6 Ran. 386.

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decision, we are of opinion that the proposition laid down by him in the passage quoted above is too broad to be strictly correct. The test is not whether the offences charged in the two trials are unconnected, but whether they are distinct offences.

For the reasons given above, we are unable to accept either of the contentions raised on behalf of the appellants. The appeals are dismissed.