AVTAR SINGH

v.

STATE OF PUNJAB

August 24, 1964

(A. K. SARKAR, K. N. WANCHOO AND RAGHUBAR DAYAL JJ.)

Indian Electricity Act (9 *of* 1910), *ss.* 39 *and* 50—*Offence under s.* 39—*If against the Act—Who can institute prosecution.*

The appellant was prosecuted and convicted for theft of electrical energy under s. 39 of the Indian Electricity Act (9 of 1910). He contended that, as his prosecution was for an offence against the Act it was incompetent, because, it had not been instituted at the instance of any of the persons mentioned in s. 50 of the Act.

HELD : The conviction of the appellant must be set aside.

The dishonest abstraction of electricity mentioned in s. 39 of the Act cannot be an offence under the Indian Penal Code for under it alone it is not an offence; the dishonest abstraction is by that section made a theft within the meaning of the Code, that is, an offence of the variety described in the Code as theft. As the offence is created by raising a fiction, the section which raises the fiction, namely s. 39 must be said to create the offence. Since the abstraction is to be deemed to be an offence under the Code, the fiction must be followed to the end and the offence so created would entail the punishment mentioned in the Code for that offence. The punishment is not under the Code itself for under it abstraction of energy is not an offence at all. Further, the object of s. 50 of the Act is to prevent prosecution for offences against the Act being instituted by any one who chooses to do so because, the offences can only be proved by men possessing special qualifications, and there is no reason why it should not have been intended to apply to dishonest abstraction of energy made an offence of theft by s. 39. [107A-C, E-G].

Emperor v. *Vishwanath*, I.L.R. [1937] All. 102, *Dhoolchand* v. *State* [1956] I.L.R. 6 Raj. 856 and *In re. P. N. Venkatarama Naicker*, A.I.R. 1962 Mad. 497, approved.

State v. *Maganlal Chunilal Bogawat*, A.I.R. 1956 Bom. 354, *Tulsi Prasad* v. *The State*, (1964) 1 Cr. L.J. 472 and *Public Prosecutor* v. *Abdul Wahab*, (1964) L.W. 271 (F.B.), overruled.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 42 of 1963.

Appeal by special leave from the judgment and order dated November 13, 1962 of the Punjab High Court in Criminal Revision No. 648 of 1962.

O. P. Rana, for the appellant.

Gopal Singh and *R. N. Sachthey*, for the respondent.

The Judgment of the Court was delivered by

Sarkar J. The appellant was prosecuted for theft of electrical energy from the Punjab State Electricity Board and

was convicted. In this appeal the appellant has not sought to challenge the finding that he had committed the theft. He has only raised a point of law that his conviction was illegal in view of certain statutory provisions to which, therefore, we immediately turn.

The statute concerned is the Indian Electricity Act, 1910. Section 39 of the Act, so far as material, provides, "Whoever dishonestly abstracts, consumes or uses any energy shall be deemed to have committed theft within the meaning of the Indian Penal Code". It is not in dispute that the appellant had committed the theft mentioned in this section. Section 50 of the Act provides, "No prosecution shall be instituted against any person for any offence against the Act.... except at the instance of the Government or an Electrical Inspector, or of a person aggrieved by the same." The appellant's contention is that his prosecution was for an offence against the Act and it was incompetent as it had not been established that it had been instituted at the instance of any of the persons mentioned in s. 50. The Courts below held that the prosecution was not for an offence against the Act and in that view of the matter held that s. 50 did not apply. On the question whether it had been instituted by a person mentioned in s. 50, the prosecution gave no materials for a decision.

The statute concerned is the Indian Electricty Act, 1910. the Act or not has come up before the High Courts on several occasions and the decisions disclose a diversity of opinion. It will be convenient to refer to these opinions at this stage. In *State* v. *Maganlal Chunilal Bogwat*(1), *Tulsi Prasad* v. *The State*(2) and *Public Prosecutor* v. *Abdul Wahab*(3), it was held that the theft was not an offence against the Act while the contrary view was taken in *Emperor* v. *Vishwanath*(4), *Dhoolchand* v. *State*(5) and *In re P. N. Venkatarama Naicker*(6).

In our opinion, the view expressed by the Allahabad High Court in *Emperor* v. *Vishwanath*(4) is the correct one. The matter was there put in these words: "The learned Sessions Judge was of opinion that the offence was not an offence against the Act because it was one punishable under the provisions of s. 379 of the Indian Penal Code. We think that this would not have been an offence under section 379 of the Indian Penal Code if it had not been for the provisions of section 39 of the Indian Electricity Act. It was therefore, an offence which was created by

that section and we are of opinion that the legislature intended section 50 to apply to an offence of this nature." We are in complete agreement with this statement of the law.

We may now set out the reasons on which the contrary view was taken and state why we are unable to accept them. In *State* v. *Maganlal Chunilal Bogawat*(1) it was stated that s. 39 of the Electricity Act only extended the operation of s. 379 (s. 378?) of the Penal Code and *Vishwanath's* case(2) was wrongly decided as s. 39 expressly made the dishonest abstraction of electrical energy an offence punishable under the Code. In *Tulsi Prasad* v. *The State*(3) an additional reason in support of the same view was given and that was that s. 39 could not create an offence as it did not provide for any punishment. The case of *Public Prosecutor* v. *Abdul Wahab*(4) seems to have proceeded on the basis that s. 39 created a fiction by which something which was not a theft within the Indian Penal Code became one under it and so the offence was really under the Code. It was also stated that the purpose of the fiction was merely to create an offence but as the punishment for it was provided only under the Indian Penal Code, the offence really became one under the latter statute.

With regard to the first reason that s. 39 of the Act extended the operation of s. 378 of the Code, it seems to us beyond question that s. 39 did not extend s. 378 in the sense of amending it or in any way altering the language used in it. Section 378, read by itself even after the enactment of s. 39, would not include a theft of electricity for electricity is not considered to be movable property. The only way in which it can be said that s. 39 extended s. 378 is by stating that it made something which was not a theft under s. 378, a theft within the meaning of that section. It follows that if s. 39 did so, it created the offence itself and s. 378 did not do so. In this view of the matter we do not think it possible to say that the thing so made a theft and an offence, became one by virtue of s. 378.

Next as to s. 39 not providing for a punishment, apart from the question whether an offence can be created by a statutory provision without that provision itself providing for punishment, on which we express no opinion, we think it clear that s. 39 must be read as providing for a punishment. First it is clear to us that the Act contemplated it as doing so, for ss. 48 and 49

speak of penalties imposed by s. 39 and acts punishable under it. In *Public Prosecutor* v. *Abdul Wahab*(1) it was stated that the language used in ss. 48 and 49 cannot be regarded as strictly accurate. Such an interpretation is not permitted for "the words of an Act of Parliament must be construed so as to give sensible meaning to them." The words ought to be construed *ut res magis valeat quam pereat* : *Curtis* v. *Stovin*(2). And we find no difficulty in taking the view that s. 39 does provide for a punishment. It says that the dishonest abstraction of energy shall be deemed to be theft within the meaning of the Indian Penal Code. The section, therefore, makes something which was not a theft within that Code, a theft within it, for if the abstraction was a theft within the Code, the section would be unnecessary. It follows from this that the section also makes that theft punishable in the manner provided in it, for if the act is deemed to be a theft within the Code it must be so deemed for all purposes of it, including the purpose of incurring the punishment. In *State* v. *Maganlal Chunilal Bogawat*(8) it was also stated that the offence of abstraction of energy is by s. 39 expressly made punishable under s. 379. We find no such express provision in s. 39. Even if there was such a provision in the Act, the liability to punishment would arise not under the Code but really because of s. 39. It will be impossible to hold that without s. 39 there is any liability to punishment under the Code for any abstraction of electrical energy. In *Public Prosecutor* v. *Abdul Wahab*(1) it was observed that since s. 39 created a theft within the meaning of the Indian Penal Code by means of a fiction, it followed that as the fiction could not be departed from, the offence so fictionally created was one under the Code. We are unable to appreciate this reasoning. If a provision says that something which is not an offence within the meaning of another statute is to be deemed to be such, the offence is, in our view, created by the statute which raises the fiction and not by the statute within which it is to be deemed by that fiction to be included. If the other view was correct, it would have to be held that the offence was one within the last mentioned statute *proprio vigore* and this clearly it is not. At this stage we might point out that in *Abdul Wahab's*(1) case it was stated that "It can be accepted that s. 39 of the Act creates an offence." It seems to us that if so much is conceded, it is impossible to say that s. 50 would not apply to a prosecution in respect of it for it applies to every prosecution "for any offence against this Act".

To put it shortly, dishonest abstraction of electricity mentioned in s. 39 cannot be an offence under the Code for under it alone it is not an offence; the dishonest abstraction is by s. 39 made a theft within the meaning of the Code, that is, an offence of the variety described in the Code as theft. As the offence is created by raising a fiction, the section which raises the fiction, namely s. 39 of the Act, must be said to create the offence. Since the abstraction is by s. 39 to be deemed to be an offence under the Code, the fiction must be followed to the end and the offence so created would entail the punishment mentioned in the Code for that offence. The punishment is not under the Code itself for under it abstraction of energy is not an offence at all.

We may now refer to certain general considerations also leading to the view which we have taken. First, we find that the heading which governs ss. 39 to 50 of the Act is "Criminal Offences and Procedure". Obviously, therefore, the legislature thought that s. 39 created an offence. We have also said that ss. 48 and 49 indicate that in the legislature's contemplation s. 39 provided for a punishment. That section must, therefore, also have been intended to create an offence to which the punishment was to attach. The word 'offence' is not defined in the Act. Since for the reasons earlier mentioned, in the legislature's view s. 39 created an offence, it has to be held that that was one of the offences to which s. 50 was intended to apply. Lastly, it seems to us that the object of s. 50 is to prevent prosecution for offences against the Act being instituted by anyone who chooses to do so because the offences can be proved by men possessing special qualifications. That is why it is left only to the authorities concerned with the offence and the persons aggrieved by it to initiate the prosecution. There is no dispute that s. 50 would apply to the offences mentioned in ss. 40 to 47. Now it seems to us that if we are right in our view about the object of s. 50, in principle it would be impossible to make any distinction between s. 39 and any of the sections from s. 40 to s. 47. Thus s. 40 makes it an offence to maliciously cause energy to be wasted. If in respect of waste of energy s. 50 is to have application, there is no reason why it should not have been intended to apply to dishonest abstraction of energy made a theft by s. 39. For all these reasons we think that the present is a case of an offence against the Act and the prosecution in respect of that offence would be incompetent unless it was instituted at the instance of a person named in s. 50.

Learned counsel for the respondent also sought to contend that the present prosecution was at the instance of a person

aggrieved by the theft. We do not think we should allow him at this stage to go into that question. The appellant has all along been contending that his prosecution was bad because it was not at the instance of the Government or an Electrical Inspector or a person aggrieved by the theft. It was clearly for the respondent if it was minded to go into that question, to establish that the prosecution had been instituted at the instance of a person aggrieved as it now seeks to do. It has never been disputed at any earlier stage that the prosecution had not been at the instance of one of the persons mentioned in s. 50. The onus of proving that fact was clearly on the respondent. It is a question of fact and we have no material on the record by which we can decide it. We, therefore, think that this case must be decided on the basis, as it was in the courts below, that the prosecution would be incompetent under s. 50 if it was in respect of an offence against the Act. We have found that it was in respect of such an offence.

The result is that the appeal is allowed and the conviction of the appellant is set aside.

Appeal allowed.