
(1906) 12 CAL CK 0027
In the Calcutta High Court

Berckefeld

APPELLANT

Vs

Emperor

RESPONDENT

Date of Decision : 03-12-1906

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 133
Penal Code, 1860 (IPC) — Section 268, 290

Citation : (1907) ILR (Cal) 73

Hon'ble Judges : Gupta, J;Brett, J

Bench : Division Bench

Judgement

Brett and Gupta, JJ.—The appellant Mr. Berckefeld, Manager of the Bally Khal Bone Mills, has been convicted u/s 290 Indian Penal Code, of committing a public nuisance, and has been punished with the maximum penalty, a fine of Rs. 200.

2. The nuisance complained of was that he kept a stack of bones, weighing about 100 tons, in the mill-yard exposed to the sun and rain for a time sufficient to cause them on the 17th July last to become rotten and to emit a smell so offensive as to cause common injury or annoyance to persons living in the vicinity and using a public road passing by the mill building. The prosecution was instituted in consequence of information given by Mr. Macpherson, the Manager of the Baranagore Jute Mill, which adjoins the compound of the Bally Khal Bone Mills, and after a local enquiry had been made by Mr. Ballantine, Sub-Deputy Magistrate.

3. It seems that on the 1st December 1905 in consequence of a complaint made the District Magistrate passed an order u/s 133 Criminal Procedure Code, directing the Manager of the Bone Mill not to stack bones in the open, where they would be exposed to sun and rain, and accordingly after receipt of Mr. Ballantine's report an order was passed for the prosecution of the appellant u/s 188 Indian Penal Code, and the case was made over to the Sadar Subdivisional Magistrate for trial. After however the accused had appeared, the prosecution u/s 188 Indian Penal Code was withdrawn by the Government Prosecutor, for reasons

stated in the Magistrate's order of the 13th August, and the prosecution u/s 290 Indian Penal Code instituted. Witnesses on both sides were afterwards examined and the accused was convicted on the 28th August 1906.

4. In support of the appeal it has first been urged that the prosecution was not instituted bona fide to stop a nuisance, but in order to render it impossible for the appellant to carry on his business, and so to compel him to vacate the site of the factory, which the informant Mr. Macpherson was desirous of obtaining possession of, for the purposes of extending his premises. Mr. Macpherson admitted that he should be glad to obtain the land covered by the Bone Mills, but denied that he lodged the information with any intention of getting the appellant turned out of it. The Magistrate has believed that Mr. Macpherson acted in perfect good faith for the purpose merely of putting a stop to the nuisance, and after hearing the arguments of counsel on both sides we see no reason to differ from that opinion.

5. It has next been contended that, in fact, the accused was not guilty of committing any nuisance, that in determining the question the rights of both accused and complainant must be considered, that the Bally Khal Bone Mill, as well also as the Ganges Bone Mill close by, were working in their present sites for years before complainant's jute factory was started, that the buildings now occupied by the jute factory originally were used as paper mills, that the neighbourhood was therefore one in which unsavoury trades had for years been carried on, and that when the complainant came to start a jute factory there he must have known such was the case. It has accordingly been urged that in determining this question the character of the locality must be taken into consideration, as also the class of persons of whom the public affected by the business is composed. It is contended that the inconvenience, before it can be held to be a nuisance, must be something more than fanciful or one of mere delicacy or fastidiousness; it must be an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain, sober, simple notions among English people, *Walter v. Selfe* (1851) 20 L.J. Ch. 433. It has further been urged that the accused was entitled to a reasonable use of his property and that the act complained of did not amount to an unreasonable use. The cases of *Sanders Clark v. Grosvenor Mansions Co., Ltd.* and *G. D'Allessandri* (1900) 2 Ch. 373 and of *Sturges v. Bridgman* (1879) 11 Ch. D. 852 are relied upon.

6. In support of the conviction the learned Deputy Legal Remembrancer has referred to the case of *Rex v. Neil* (1826) 2 C. & P. 485 as laying down that to support an indictment for nuisance it is not necessary that the smells produced by it should be injurious to health: it is sufficient if they be offensive to the senses. This too is clear from the provisions of Section 268 Indian Penal Code.

7. The question for our consideration resolves itself down to this was the act or omission on the part of the accused, the subject of the charge, such as he was

entitled to do in carrying on the working of his factory in a reasonable way, and was the inconvenience one which having regard to the trades carried on in the locality the complainant had good reason to expect to feel when he came to open his mill in the locality, or on the other hand was it an act or illegal omission on the part of the accused which caused common injury or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury or annoyance to persons who may have occasion to use a public right.

8. Now the nuisance complained of is not one resulting out of the ordinary working of the bone factory, but out of certain special acts or omissions on the part of the accused, These were that he allowed 100 tons of bones to remain in the yard of the mill unprotected from sun or rain till they became putrid and gave out such an overpowering and obnoxious smell as to materially interfere with the ordinary comfort of persons such as Mr. Macpherson and of others living near, and also of persons going along a railway siding to the brickfields from the railway station. It is alleged that the public have been allowed to use this pathway for a long series of years.

9. In defence of the accused it was stated that the stack of bones was covered with tarpaulins, but the condition of the stack and its surroundings was not denied. The officer, who made a local inquiry, has deposed to the condition of the stack and the surroundings, and his evidence leaves no doubt that they created a distinct nuisance. He has also proved that on two occasions when he visited the mill the stack was not covered with tarpaulin. We see no reason to differ from the finding of the Magistrate that the stack of bones was in the open and uncovered. The accused or his predecessor in office had been forbidden in December last by an order of the Magistrate to keep bones so exposed as they would necessarily cause a nuisance, and there can be no doubt that in this case his omission to keep the bones properly protected was illegal. It cannot be held to be a reasonable use of his premises for the purpose of carrying on his trade.

10. The evidence of Mr. Macpherson, of the investigating officer, and of the other witnesses, leave no doubt that the smell created by the decomposing bones was such as materially to interfere with the ordinary physical comfort of human existence, and that this was felt by people living in the locality and the public who had occasion to use the footpath down the railway. It was not a matter of fancy or fastidiousness on their part.

11. The circumstances that an unexpectedly large consignment of bones had arrived and that afterwards there was a strike among the coolies are not sufficient excuse for the commission of the nuisance.

12. In our opinion the guilt of the accused was fully established and we dismiss the appeal.