1916.

Present: De Sampayo J.

GNANAPRAKASAM *v.* BULNER.

502—P. C. Gampola, 9,487.

Theft—Removal of coke from the Railway yard—Bona fide belief that it was thrown away—Penal Code, s. 72.

Abandoned things cannot be the subject of theft. It is not necessary that the subject should, in fact, be a derelict; it is sufficient if the person charged *bona fide* believed it to be so.

THE facts are fully set out in the judgment.

A. St. V. Jayewardene, for second accused, appellant.—It is clear from the finding of the Magistrate that the public believe that coke was thrown away by the Railway authorities. The appellant *bona fide* believed that coke was thrown away as entirely useless. Section 72 of the Penal Code enacts that no offence is committed by a person who by a mistake of fact believes himself to be justified by law in doing it. The accused did not get the coke removed "dishonestly". Counsel sited *17 Cal. 852* and *8 All. 51*.

Cur. adv. vult.

June 6, 1916. DE SAMPAYO J.—

The charge against the appellant came to be made in the following circumstances. A Moor boy, named Madar Lebbe, was detected in the act of removing some coal from the Railway premises at Nawalapitiya, and was promptly charged with theft of the coal. He told the Court that he did not steal the coal but took it on the orders of the appellant. He was convicted by the Magistrate and sentenced to be caned. The appellant was then made an accused, and was charged with abetting the theft. The appellant frankly admitted that the boy was asked by her to bring some coke, which is usually found thrown about the Railway yard, as she wanted it for use in a smoothing iron for baby linen. She added that she did not want coal, which was useless to her for the smoothing iron or for any other purpose; that she was under the impression that the cinders in the yard was discarded property and might be taken by any one; and that if she had known she could not take it, she would not have sent the boy. The appellant is a respectable Burgher lady, and is wife of the Postmaster of Nawalapitiya, who has been in Government service for eighteen years, and there is no reason whatever to disbelieve her evidence. The boy, Madar Lebbe, was called as a witness against her, but his evidence goes

for nothing. In the first place, he was not present on the day when he was to be cross-examined on behalf of the appellant. The proceedings contain this curious record: "He is reported by the Police to have been sent away by the Post Office authorities." But surely that cannot be. The Police either did not mean what they said, or did not say what they meant. The caning which the boy received is, I think, a sufficient explanation as to how he came thereafter to give the Police Court a wide berth. However that may be, the appellant is not a Post Office authority, and cannot have been meant by the Police, and I need not therefore consider an affidavit submitted in appeal, in which she has sworn that she was not responsible directly or indirectly for the boy's absence, that she was wholly unaware of the fact, and that the boy was not even a servant. The boy's evidence was in any event not admissible in law against the appellant, and ought to have been taken as struck out. The importance of this point lies in the fact that the only evidence whch could in the remotest degree bear on the charge is that of the boy, and the case is therefore reduced to one in which there is no evidence against the appellant. In fairness to the appellant, however, I may say that, in my opinion, the boy's evidence as it stands, without being sifted by cross-examination, is insufficient, even if admitted. At that stage of the proceedings the importance of the difference between coal and coke or cinders was not noticed. The Tamil word for both coal and coke is *kari*, which, as a matter of fact, means charcoal, and it is significant that the Police Constable Gnanaprakasam, who arrested the boy, said that he did so on the information of the Assistant Locomotive Superintendent, who had complained that the boy had removed "charcoal" from the Railway yard. The accused says that she told the boy to bring some *kari*, meaning coke or cinders, and no doubt the boy's cross-examination, if there had been one, would have been directed to that point. The lady's evidence makes it clear that the boy either misunderstood what she meant or disregarded her instructions, and took some coal instead of coke. The Magistrate, however, thinks that it makes no difference whether she sent for coal or coke. There, I think, he is wrong. He is, of course, quite right in saying that the general public has no right to remove coke from the Railway premises, "a thing which (he says) appears to be insufficiently realized." Herein lies the real point of the whole case. The appellant candidly confesses that she had not realized the fact at all, but, on the contrary, *bona fide* believed that the coke was thrown away as entirely useless and might be taken by any one without objection. The appellant was undoubtedly mistaken in believing that the Railway had abandoned this property. But the Magistrate has apparently failed to appreciate the effect of such a mistake of fact. Abandoned things cannot be the subject of theft; they may be taken by any one without committing an offence. Thus, it has

1916.

DE SAMPAYO J.

Gnanaprakasam v. Bulner

been held in India that a bull which has been set at liberty by a Hindu as part of a religious ceremony is not the subject of theft, as the owner has abandoned his property in it (*Romesh Chander v. Hira Mondal*,[1] *Rex v. Bandhu* [2]). It is not necessary that the subject should, in fact, be a derelict; it is sufficient if the person charged *bona fide* believed it to be so. Section 72 of the Penal Code declares " nothing is an offence which is done by any person . . . . . 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." The law here accords with common sense. Moreover, the gist of the offence of theft is the taking of another's property " dishonestly ". This, again, means the intention to cause " wrongful loss " to that person, but there can be no " intention " to cause wrongful loss to him when it is in good faith believed that he has abandoned the property and no longer wishes to have it. " In such case," says Mayne, " the maxim *ignorantia legis neminem excusat* has no application. The ignorance does not operate to excuse the crime, but to show that one of the essential ingredients of the crime is wanting." I am accordingly of opinion that in the circumstances of this case it is not possible to find the appellant guilty of abetment of the offence of theft.

The conviction is set aside, and the appellant acquitted.

Set aside.

[1] *I. L. R. 17 Cal. 852.*

[2] *I. L. R. 8 All. 51.*