

APPELLATE CRIMINAL.

Before Holmwood and Sharfuddin JJ.

1914
Feb. 4.

BALTHASAR

v.

EMPEROR.*

Criminal breach of trust—Property and its sale-proceeds—Charge relating to property, but conviction of misappropriation of the sale-proceeds—Legality of conviction—Absence of dishonest intention at the date of the sale—Penal Code (Act XLV of 1860), ss. 405, 409.

Section 405 of the Penal Code does not cover misappropriation by a person of the sale-proceeds of the property entrusted to him.

A person charged with criminal breach of trust of certain property entrusted to him cannot be convicted of embezzling, not the property, but the amount obtained by dealing with it.

Bipra Das Giri v. Niradmoni Bewa (1) followed.

But assuming that "property," in s. 405 of the Penal Code, includes the value thereof, viz., its sale-proceeds, a person cannot be said to have disposed of the property or the sale-proceeds, in violation of his contract, dishonestly, unless it is shown that he had the intention of dishonestly appropriating the sale-proceeds, on the date of the sale, of which there was no evidence in the case.

An auctioneer is not liable for criminal breach of trust merely because he does not punctually carry out every term in the agreement, *e.g.*, as to the of the sale and the time of payment of the proceeds.

THE appellant, C. Balthasar, was tried before the Fifth Presidency Magistrate and convicted and sentenced, on the 6th December 1913, under s. 409 of the Penal Code, to a fine of Rs. 500 and in default to four months' rigorous imprisonment.

* Criminal Appeal No. 1076 of 1913, against the order of K. B. Das Gupta, Fifth Presidency Magistrate, Calcutta, dated Dec. 6, 1913.

(1) (1903) 12 C.W.N., 577.

It appeared that the appellant carried on the business of a public auctioneer at his premises No. 102, Ripon Street, in Calcutta, and that according to the rules of the same the proceeds were payable a month after the date of the sales, less a discount of 10 per cent. for commission. In October 1912, one W. J. O'Grady sent some household furniture to the appellant for sale, and the latter sold eight articles in different lots, viz., three on the 24th November for Rs. 109, one on the 5th December for Rs. 45, two on the 22nd December for Rs. 45, and two on the 29th December 1912. O'Grady then made repeated demands on the appellant for payment, but was put off from time to time, and ultimately removed the rest of the furniture from his premises in January or February 1913. He wrote several letters to the appellant thereafter, and saw him personally about the outstandings, but was put off repeatedly. It transpired that the appellant had met with domestic misfortunes and was unable to attend to his business, and in consequence fell into pecuniary difficulties, though he paid off some of his creditors. On the 23rd September 1913, O'Grady lodged an information at the thana against the appellant and he was sent up for trial by the police.

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At the trial the appellant admitted the sale of the eight articles and the amount of the sale price but claimed a commission. He was charged as follows:—

“(i) That you on or about the 24th November 1912, in Calcutta, being a public auctioneer, committed criminal breach of trust in respect of 3 articles of household furniture, viz., almirah, etc., worth Rs. 109, given to you by W. J. O'Grady for sale and remittance of the sale-proceeds to him, and you thereby committed an offence under section 409, I.P.C. ;

(ii) That you on or about the 5th December 1912 committed criminal breach of trust in respect of one article of household furniture, viz., a small case worth Rs. 45, given to you by W. J. O'Grady,

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(iii) That you on or about the 22nd day of December 1912, committed criminal breach of trust in respect of two articles of household furniture, *viz.*, a wash stand and a table, worth Rs. 45, given to you by W. J. O'Grady"

The material portions of the Magistrate's judgment were in the following terms :—

"From the defence taken by the accused it is difficult to say what the accused's line of defence is. He never said nor suggested that he had not received the sale-proceeds and his own admissions point to the contrary. He has examined a few witnesses to prove that his dealings with them have been honest, but that does not in any way exculpate him of his dishonest dealings with Mr. J. O'Grady. There is clear evidence, which the defence has failed to rebut, that the accused is guilty of a dishonest violation of his contract with Mr. W. J. O'Grady. He was entrusted with the furniture by Mr. O'Grady for sale and for remittance of the sale-proceeds to him, he sold the furniture, but misappropriated the sale-proceeds : he put the money into his own pocket and never sent it to Mr. W. J. O'Grady. The evidence adduced by the prosecution goes also to show that he has similarly dealt with two others of his customers, one Mr. Banermann and another Mr. Salt. I find a clear case under section 409 P. C. made out against Mr. Balthasar on all the three counts of the charge framed against him of having committed criminal breach of trust as an auctioneer in respect of Mr. W. J. O'Grady's furniture, on three different dates, and convict him accordingly.

The accused thereupon appealed against the conviction and sentence to the High Court.

Mr. Bagram (with him *Babu Tarkessur Pal Chowdhury*), for the appellant. The accused was charged with criminal breach of trust of the furniture, but has been convicted of misappropriating the sale-proceeds. The conviction is bad. Further, the offences are laid in the charge as on the dates of the sale, but the moneys were not due till a month later and the misappropriation could not, therefore, have taken place on those dates. It has not been stated in the charge nor found when and how the misappropriation took place. There was no dishonest intention at

the time of the sales. (He then dealt with the evidence on the point.)

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Babu Manmatha Nath Mukerjee, for the Crown. Property includes its sale-proceeds, and the charge covers a case of misappropriation of the latter. The dishonest intention is made out by the fact of the appellant having continued to sell other lots of the furniture, when he was unable to pay the price of the first lot and of his keeping the whole proceeds. There is also evidence in the case of other similar instances of misappropriation bearing on the question.

HOLMWOOD AND SHARFUDDIN JJ. This is an appeal from the judgment and sentence of the learned Presidency Magistrate, Fifth Court, convicting the appellant C. Balthasar, of an offence under section 409 of the Indian Penal Code and sentencing him to pay a fine of 500 Rupees, or in default to be rigorously imprisoned for four months on the first count of the charge, no separate sentence being passed on the other two counts of the charge.

The first objection raised to this conviction is that the charge is defective and misleading, and that no conviction can be held upon that charge for the alleged misappropriation of the sale-proceeds of the furniture. The second objection is that there is no finding of when and how the appellant criminally misappropriated the sale-proceeds and nothing to show dishonest intention.

The charge is a curious one and runs as follows:—
“That you on or about the 24th November 1912, in Calcutta, being a public auctioneer, committed criminal breach of trust in respect of three articles of household furniture, almirah, etc., worth 109 rupees, given to you by Mr. W. J. O’Grady for sale and remittance of the sale proceeds to him, and you thereby

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committed an offence under section 409 of the Indian Penal Code;" and the other two charges are similar with regard to sales of furniture on the fifth December 1912, and on the 22nd December 1912.

It is argued, and in our opinion very forcibly argued, that this charge cannot possibly relate to the alleged misappropriation of the sale proceeds. Section 405 says, "whoever being in any manner entrusted with property or with any dominion over property dishonestly misappropriates or converts to his own use that property or dishonestly uses or disposes of that property in violation of any direction of law, or of any legal contract expressed or implied which he has made touching the discharge of such trust, is guilty of criminal breach of trust." Now, substituting the word "furniture" for the word "property," it would be clear that the section does not cover misappropriation of the sale-proceeds. But even assuming, as we think it ought to be assumed, that the word "property" includes furniture or the value thereof, even then it could not be said that the appellant had disposed of the furniture or the value thereof, namely, the sale-proceeds, in violation of his contract dishonestly, unless it were shown that he had the intention of dishonestly appropriating the sale-proceeds at the time of the sale; and the dates given in the charge clench this contention which is admitted by the learned vakil for the prosecution. He says that it is incumbent on the prosecution to prove that on the date of sale the accused intended to misappropriate the sale proceeds. There is absolutely no evidence for that, and indeed all the evidence goes to the contrary. There was a regular business going on and all moneys received were paid into the account of that business, and the ordinary practice of the business was to pay

the sale-proceeds out to the owners of the goods sold one month after the sale, and it is put forward as evidence of the dishonest intention of the appellant, that not having been able to pay the money due on the 23rd December in connection with the sale of the 24th November, he still went on selling the furniture for Mr. O'Grady on the 29th December and took the sale-proceeds. But this apparently was with Mr. O'Grady's knowledge and consent, and it was not till January or February that Mr. O'Grady removed the remainder of his furniture from the appellant's hand. It cannot be said that the auctioneer is liable for criminal breach of trust if he does not punctually carry out every term in the agreement. For instance, if he did not hold the sale on the agreed date, the 24th November, it could not be said that he committed criminal breach of trust. In the same way if there was delay in payment, that is not in itself a breach of trust. On the dates in the charge it is clear that the wider sense which is sought to be given to the charge cannot possibly be accepted. The offence having been said to have been committed on the 24th November, it cannot be applied to misappropriation of money on or after the 23rd December. It is conceivable that a charge might have been framed to cover the whole circumstances of the transaction, but this is not such a charge; and it seems to us to fall within the rule laid down in the case of *Bipra Das Giri v. Niradmoni Bewa* (1), to which one of us was a party, that where the charge against the accused is to the effect that he committed breach of trust in respect of some property which he took from the complainant, and was, therefore, guilty of an offence punishable under section 406, but at the trial he was convicted of embezzling not the property but the

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amount obtained by dealing with the property, that the conviction was bad and must be set aside. We are, therefore, of opinion that, on the first point, this appeal must succeed and the conviction and sentence must be set aside.

But as that might render a re-trial necessary, we must also proceed to deal with the second point namely, whether there is any finding or any evidence of dishonest intention referable to the 24th November, 5th December and 22nd December, respectively, in respect of these three charges. We are unable to find any such finding or any such evidence, and none has been shown to us. It is not pretended that on the dates of the auction sales the appellant had the slightest dishonest intention or did not mean to make good the money to the complainant.

It is admitted that, owing to terrible domestic misfortune in which the complainant himself deeply sympathised, he was unable to attend to his business and fell into grave pecuniary difficulties. Under these circumstances, he has been unable to satisfy his creditors of whom the complainant is one. But that he has been endeavouring to do so is clear from the evidence of Mrs. Brennan who, although she comes forward with the allegation that she has been cheated by the appellant, admits that she has been paid every penny of her money except Rs. 2-13. Then again it is sought to show dishonesty from the evidence of one Mr. Salt, a civil engineer, who says that he instituted a case on the same ground as the present case against the appellant in the Second Presidency Magistrate's Court, but withdrew it on getting a *hundi* which subsequently turned out to be a bogus one on a forged Bank (whatever that may be), and it was dishonoured. He was cross-examined to show that he had received a notice from the Court prohibiting the

accused from paying the money on the *hundi*. This he denied, but the learned counsel who appears for the appellant has very rightly laid before us the actual order of this Court prohibiting the appellant from paying the money due on that *hundi* to Mr. Salt on the ground that it was attached by one of Mr. Salt's creditors. There is, therefore, absolutely no evidence of dishonesty in this incident, nor, had it been shown that the appellant acted dishonestly towards Mr. Salt, could we have accepted that as any evidence of intention in the present case: for we are not aware when these transactions took place with Mr. Salt, and there is nothing in the evidence to show us. We are, therefore, on the second point also of opinion that the conviction is bad, there being no evidence and no finding of dishonest intention within the meaning of section 405 of the Indian Penal Code.

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The conviction and sentence are, therefore, set aside and the accused acquitted. The fine, if paid, will be refunded and the appellant will be discharged from his bail.

E.H.M.

Appeal allowed.