

APPELLATE CRIMINAL.*Before Greaves and Panton, JJ.*

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March 3.

KHITISH CHANDRA DEB ROY

v.

EMPEROR.*

Criminal Breach of Trust—Taking goods on approval under agreement to pay cash—Sale before such payment—Penal Code (Act XLV of 1860), s. 406.

When a person takes goods on approval under an agreement that property therein was to pass only if he exercised his option to take them and paid cash in full for certain articles and in part for others, the trust continues till the option is exercised and cash payments made, and he commits criminal breach of trust if he sells them without such payments.

ON the 31st May 1923 the appellant went to the shop of Messrs. Boseck & Co., jewellers, and represented that he was a relation of a Raja and wanted to purchase jewellery for his daughter. He asked to be allowed to take the articles for her approval and selected and took some away. The next day he brought back two of them as not approved of and selected some further articles also on approval. The agreement then entered into was that, on approval, he was to pay cash in full for the articles taken on that day and half for those taken on the previous day. On the 2nd June he sold the articles, taken on the above dates at prices lower than those which Boseck had charged. He went again to the firm on the 4th and took some more articles. He was tried before the Third Presidency Magistrate, under s. 406 of the Penal

* Criminal Appeal No. 555 of 1923, against the order of A. Z. Khan, Third Presidency Magistrate of Calcutta, dated Sep. 7, 1923.

Code, and convicted and sentenced, on the 9th September, to two years' rigorous imprisonment. He now appealed to the High Court.

Babu Narendra Kumar Bose (with him *Babu Bibhuti Bhusan Saha*), for the appellant. The conviction is bad on the facts. The case is governed by s. 78, illust. (b) of the Contract Act. When property is given to a customer on approval, without any agreement as to the terms of payment, ownership therein passes to him absolutely when he decides to take the goods, and no case of criminal breach of trust arises by his sale of them: *Ex parte Wingfield* (1), *Kirkham v. Attenborough* (2).

The Offg. Deputy Legal Remembrancer (*Mr. Khundkar*) for the Crown, contended that the conviction was right on the evidence in the case, and cited *Weiner v. Gill* (3).

GREAVES J. The appellant has been convicted by a Presidency Magistrate of an offence under section 406 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for a term of two years. Section 406, under which the appellant was convicted, relates to criminal breach of trust, and criminal breach of trust, as defined in section 405, means dishonest misappropriation or conversion by some one of property entrusted to him or over which he has been given dominion.

The facts of the present case are as follows. On the 31st of May last year the appellant called at Messrs. Boseck & Co., a jeweller in Chowringhee Road, and represented that he was a relation of the Raja of Naldanga, and stated that he wanted to buy some jewellery for his daughter's wedding and that

(1) (1879) L. R. 10 Ch. D. 591. (2) [1897] 1 Q. B. 201.

(3) [1906] 2 K. B. 574.

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he wanted the goods for approval as his daughter could not come out. According to the prosecution story the appellant selected some articles of jewellery and signed a receipt for them in the inspection book and took them away. He subsequently returned on the 1st of June, brought back two of the articles taken by him on the 31st May, of which he did not approve, and selected some further articles of jewellery which he took away also on approval. On the 4th June the accused came again to the shop and took some further articles which he put on his person. It subsequently transpired that, on the 2nd June, he had sold the articles taken away by him on the 31st May and the 1st June,—as to the articles taken away on the 1st June at prices about a third of those at which they were priced by Messrs. Boseck & Co. Under these circumstances the appellant has been convicted, and it is now contended on his behalf that he was wrongfully convicted of criminal breach of trust under the provisions of section 406 of the Indian Penal Code: and reliance is placed on the provisions of section 78 of the Indian Contract Act and *illustration (b)* thereto. It is said that when a person is given articles of jewellery, as in the present case, for approval, nothing being agreed or said as to the terms of payment, the property in the goods passes to the person entrusted with the goods whenever he exercises his approval and elects to take the goods, and it is said that thereupon the trust ceases and the property becomes the absolute property of the person to whom the goods have been handed over: and reliance is further placed on two cases that were cited to us in the argument, namely, *Ex parte Wingfield* (1), and *Kirkham v. Attenborough* (2). Both those cases are cited as authorities for the proposition that where

(1) (1879) L. R. 10 Ch. D. 591. (2) [1897] 1 Q. B. 201.

property has been handed over on approval, the property passes to the person to whom it is entrusted as soon as he has elected to approve of the property, and that in these circumstances no case of criminal breach of trust arises. As against this we have been referred by the Deputy Legal Remembrancer to the case of *Weiner v. Gill* (1) which, it is said, closely resembles the facts of this case. It is necessary under the circumstances to see on what terms the goods were entrusted or handed over to the appellant on the 31st of May and the 1st of June of the last year. The first prosecution witness, Mr. Ball, who is a partner or director of Messrs. Boseck & Co., states that he saw the appellant on the 31st May, and that the arrangement was that the goods approved of were to be paid for in cash. Mr. Ball states, with regard to the goods taken away on the 1st June, that the appellant stated that he would pay for these goods together with those previously taken away. In cross-examination he stated that there was no writing that the payment was to be in cash, and with regard to the visit on the 1st June he states that the cashier was ordered to make out cash bills as the accused was ready to pay, and he denied that there was any talk of payment by instalments. I should say that, in the events which have happened, certain small sums were paid by the accused on account, but I do not think that this really affects the matter. What one has got to see is what was the arrangement arrived at between the parties on the 31st May and the 1st June. The evidence of prosecution witness No. 5, the cashier of Messrs. Boseck & Co., is also material. He stated that on the 4th of June he made out two bills at the request of the appellant and that the appellant handed him a note for a thousand rupees and asked him to

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debit 800 rupees to one bill and 200 rupees to the other. It appears that the handing of the note for one thousand rupees took place after the first visit of the appellant to Messrs Boseck & Co.'s shop on the 4th June. On the first occasion he fumbled in his pockets and pretended that he had left his money behind by mistake, and asked Messrs. Boseck & Co. to send an assistant with him to his house ostensibly to fetch the money. Then, as I have already said, when he came back, instead of paying the whole amount of the bills that were made out, he tendered the note for a thousand rupees making a request for its division between the two bills in the manner I have already indicated. The cashier states that he thereupon took the two bills to Mr. Ball for his signature and that Mr. Ball said that this was not the arrangement, the arrangement made on the 1st June being that the goods taken away on that day were to be paid for in cash on the spot and that with regard to the other goods taken on the 31st May half was to be paid in cash on approval and the other half subsequently.

After reading the evidence and considering the documents the conclusion I have come to is that nothing was said about the payment of cash as against the acceptance of the goods on the 31st May. But I accept, as the learned Magistrate has done, Mr. Ball's account of what happened on the 1st of June, because I think that this is borne out by two things which subsequently happened, that is to say, by the conduct of the accused to which I have already referred on the 4th June, when he purported to be ready to make a cash payment for the bills of the whole amount and also the part payment in respect of the other articles, and I think it is further corroborated by what the accused himself surreptitiously wrote on

the exhibits Nos. 4 and 5. If there had been no arrangement for payment in cash either on the 31st May or on the 1st June there would have been no need to write as the accused did on exhibit 4 "payment of Rs. 200 a month," and further to write "instalment payments" on exhibit 5. Under these circumstances it seems to me that the arrangement of the 1st June was that the property in the goods was only to pass if the appellant exercised his option to take the goods and paid cash in respect of the goods, that is to say, a payment in full in respect of the goods taken on the 1st June, and a payment as to half the amount in cash for the goods which he took on the 31st May. In this view of the case the trust continued until the option to take the goods was exercised and the cash payment was made and, the property in the goods did not pass from Messrs Boseck & Co. to the accused until both these conditions were fulfilled. This being so, we think that the offence under section 406. of which the accused was convicted, has been established, and that the only course open to us is to dismiss the appeal. We, however, under the circumstances of the case, reduce the sentence to 18 months.

With regard to the two applications made by the purchasers for the return to them of the goods which they have purchased from the accused, the only course open to us is to dismiss these applications, having regard to our finding in the appeal that the property in the goods remained in Messrs. Boseck & Co., and has never passed to the accused. This being so, the accused could give no title to the purchasers and the two applications are accordingly dismissed.

PANTON J. I agree.

E. H. M.

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