SPECIAL BENCH.

Before Rankin C. J., C. C. Ghose, Mukerji, Mallik and Guha JJ.

1930

Dec. 2, 17.

EMPEROR

v.

SUSENBIHARI RAY.*

Criminal Breach of Trust—Executor de son tort—Entrustment—Meaning of the word "secretes"—Indian Penal Code (Act XLV of 1860), ss. 204, 406, 477.

An executor *de son tort* is held liable to account for assets which come into his hand, not upon the basis of entrustment, but upon the basis that, not being entrusted, he had no business to intermeddle. The application of the doctrine in no way depends upon the bad faith in the person intermeddling.

Jogendernarain Deb Roykut v. *Emily Temple* (1) relied on.

It is not sound to hold a person guilty of the offence of criminal breach of trust upon the basis that he became an executor *de son tort*.

A person may secrete a document not only when the existence of the document is unknown to other persons and for the purpose of preventing the existence of the document coming to the knowledge of anybody, but also when the existence of the document is known to others. But it is not necessarily enough to show that, upon an occasion on which it became his duty to produce the document, he failed to discharge that duty, though it may be a cogent piece of evidence. The fact that a man perjures himself by denying the existence of a document which, to his knowledge, is in his custody would be a still more cogent piece of evidence.

Subramania Ghanapati v. *The Queen* (2) and *Queen-Empress* v. *Muhammad Shah Khan* (3) referred to.

Per MALLIK J. (*dissentiente*).—Suppression of a document may amount to secretion.

FIAT AT THE INSTANCE OF THE ACCUSED.

The facts of the case appear fully from the judgment.

S. N. Banerji (with him *S. R. Das Gupta*) for the accused. So far as the charge under section 406 of the Indian Penal Code is concerned, there was no case to go to the jury and the learned Judge was wrong in the statement of the law in his charge to the

*Application for Review under clause 26 of the Letters Patent.

(1) (1867) 2 Ind. Jur. N. S. 234. (2) (1881) I. L. R. 3 Mad. 261.
(3) (1898) I. L. R. 20 All. 307.

1930

Emperor v. *Susenbihari Ray.*

jury. In order to constitute an offence under section 406, it must be shown that there was an actual entrustment. A trespasser may come within section 403, but he cannot be trustee within section 406. In this connection see sections 303 and 304 of the Indian Succession Act.

Clearly, a tort-feasor cannot be trustee. The words in section 405 imply that someone must entrust, it may be even to himself. Saraju had no title to the property until the executor comes into possession, therefore she could not entrust.

[RANKIN C. J. She was not a person who was entrusting, she was merely a person who was making a claim.]

That is so.

As to the charge under section 477, I submit that the two accused could not be tried together in the absence of a conspiracy. The other accused having been acquitted of the charge of conspiracy, the present accused could not be convicted. At the commencement of the proceedings, the evidence was even more meagre. Also the evidence, in such cases, against one of the accused cannot be relevant against the other unless some kind of association, abetment or conspiracy can be proved.

The charge to the jury did not disclose any offence under section 477, which talks of "secretes or tends to "secrete." There was no evidence that the will was ever in the possession of the present accused. Also, it was not put to the jury that this document was acknowledged repeatedly.

[RANKIN C. J. What does the word "secrete" mean in the Penal Code? Have you come across any definition?]

No.

[RANKIN C. J. He may be guilty of criminal misappropriation, under section 403, or of perjury, but he is not guilty of secreting.]

That is so.

1930

Emperor
v.
Susenbihari Ray.

[RANKIN C. J. A failure to disclose a document to somebody else is not secreting.]

It may amount to abetment of it but it is not secreting.

A. K. Basu (with him *G. G. Gupta Bhaiya*) for the Crown. Entrustment for the purpose of section 406 need not be entrustment by any person. The definition is wide enough and it will cover entrustment by operation of law. Section 405 and the illustration (*a*) to it make that clear. Entrustment may be "in "any manner."

By section 303 of the Indian Succession Act, the accused becomes a sort of an executor and upon him devolves certain modes of administration, prescribed by law. An executor *de son tort* is liable to account because of a breach of duty cast on him, to do certain things according to law.

[RANKIN C. J. There is no right nor duty in an executor *de son tort*. His liability arises out of intermeddling and not out of any duty.]

A person has no right to intermeddle, but if he does, a duty is cast on him to follow the directions in the will.

If the accused is unaware of the existence of the will and then if he tells the sister that he would hold the property for her, it amounts to the creation of a trust.

Regarding the charge under section 477, "secreting" does not mean secreting from the complainant or any other particular person. If the will was secreted from the court, that was good enough. It is enough that there should be concealment with a dishonest intention, no matter which person it was concealed from.

[RANKIN C. J. The word used is "secretes".]

Concealment from the court amounts to it. Secreting means "keeping the physical existence from "the view of a person or persons," but suppression of the fact of the existence of the will from the court was sufficient.

1930

Emperor
v.
Susenbihari Ray.

[GHOSE J. The wording of the charge seems to indicate that the secreting was from the complainant.]

We only say that the complainant was injured by the accused secreting the will from the court and various other persons concerned. But secreting need not be even from the court, it would be enough if it is secreted from the executor or the attorney.

[GHOSE J. The charge must be definite and not open to duplicity.]

The accused was trying to get the property by concealing the will. No further detail is necessary.

[RANKIN C. J. Concealment in the sense of non-disclosure is not in the contemplation of the section. The words "cancels, defaces, *etc.*," clearly indicate some physical act with regard to the document.]

The accused was aware of the will being in the mother's box and in the circumstances, non-disclosure was quite sufficient.

Cur. adv. vult.

RANKIN C. J. The accused Susenbihari Ray, together with his mother Swarnasundari Dasi, was tried at the High Court Sessions in May last by my brother Mallik, with the aid of a Special Jury, upon three charges of criminal breach of trust laid under section 406, Indian Penal Code, and a charge under section 477, Indian Penal Code, of secreting a document which was, or purported to be, a will executed in 1915 by his father Goshthabehari Ray. Certain charges against the accused Susen had been framed under section 404, Indian Penal Code, but these charges were withdrawn and need not be further referred to. The two accused were also charged with the offence of criminal conspiracy.

The jury, by their verdict, negatived the charge of conspiracy and acquitted Swarnasundari Dasi of all charges. They convicted the accused Susen upon all the three counts laid under section 406, Indian Penal Code, and also of the charge under section 477, Indian Penal Code. He was sentenced by the learned

1930

Emperor
v.
Susenbihari Ray.

Rankin C. J.

Judge to two years' rigorous imprisonment for criminal breach of trust and to four years' rigorous imprisonment for secreting his father's will. He has obtained a certificate from the Advocate-General to the effect that certain grounds of objection to his conviction should be further considered by the High Court.

It appears that the accused Susen has a sister whose name is Sarojbala and who is a widow with one son called Basanta. His father Goshtha made a will in 1914, but, on the 13th of July, 1915, executed another will revoking the former. This is the document with which the case is mainly concerned. By it, after providing for certain legacies, he left two-thirds of his estate to the accused Susen and one-third to his daughter Sarojbala. Goshtha died on the 6th of January, 1922, and on the 13th of February, 1922, the accused Susen applied to the Subordinate Judge, 24-Parganas, for a succession certificate to enable him to collect moneys due from certain life insurance companies, in respect of policies which his father had taken out. On the 8th of March, 1922, he gave evidence before the Subordinate Judge that his father had left no will and that he himself was his father's only heir. On the 27th of March, 1922, a succession certificate was issued to him, by virtue of which he collected the assets belonging to his father's estate mentioned in counts laid under section 406, Indian Penal Code.

The case for the prosecution was that, from the time of the father's death until the year 1929, the will of 1915 was being kept by Susen in an iron safe belonging to his mother, that he knew of the existence of the will all the time, that he obtained the succession certificate by fraud and perjury and that he has converted the sums of money which he collected thereunder, dishonestly, to his own use. The prosecution case further is that, in April, 1929, Swarnasundari had opened her iron safe and taken out a bundle of papers; that she allowed Basanta to see them; that Basanta discovered the will of 1915 and

1930

Emperor
v.
Susenbihari Ray.

Rankin C. J.

abstracted it; that he then showed it to his mother and to a pleader, with the result that the dishonest conduct of the accused Susen came to light.

The case for the defence was supported by three witnesses and was as follows: That Goshtha, having made a will in 1914 and again in 1915, was taken ill in May, 1921; that, in August, 1921, he went to the same solicitor, who had drawn his previous wills, and gave him instructions to draw another; that, on the 18th August, 1921, a new will was drafted, leaving everything to the accused Susen, save that his sister was to have maintenance or a certain allowance in lieu thereof; that, in November, 1921, Goshtha left for Simultala for a change; and that, before he left, he asked for his two former wills. That two documents were brought to him by Sarojbala, as being his two former wills, and he tore them up by way of cancellation; that he returned to Calcutta in the following month and died on the 6th of January, 1922, without having executed the new will which he had intended to execute and that, accordingly, he died intestate. The defence case, further, is that, so far from the accused Susen having any knowledge of the existence of the will of 1915, from the time of his father's death onwards he believed that this document had been destroyed, and that his father had died intestate; that if the document now produced (Exhibit 6) is really the document which his father executed in 1915, it is in existence solely by the fraud of Sarojbala who pretended to hand it up to her father for destruction in 1921 but secretly substituted something else.

It is in evidence, on the part of the prosecution, that, in February, 1922, a Mr. Chatterjee, Solicitor, at the instance of Susen, submitted a case for the opinion of the then Advocate-General stating that the will of 1915 had been torn up by Goshtha and obtained an opinion from the Advocate-General that, on the facts stated in the case, the father had died intestate. Accordingly, it is denied that the application for a succession certificate was fraudulent and it is denied

that there is any ground for the charge that he had secreted the will of 1915. Two of the witnesses called for the defence, namely, Nikunjabihari Ray and Nagendramohan Poddar, the former a younger brother of Goshtha and the latter a servant of the family, speak to the incident in November, 1921, when Goshtha is alleged to have called for his two wills and torn them up.

The case presents all the usual features of a bitter family quarrel. The complainant in the case is Sarojbala, whose moral character and credibility is elaborately attacked by the defence. The actions and conduct of the parties were canvassed at considerable length in cross-examination and upon many minor points of fact there was a complete conflict between the prosecution and the defence.

The learned Judge, in his summing up, appears to me to have laid the main features of the evidence before the jury with complete lucidity and to have given the jury much assistance in making up their minds upon the main points in controversy. He told them, in general terms, the nature of the charges and laid bare the elements of the offence in each case. He summed up the main facts and dates in such a way that the jury were put in a position to consider whether the story of the tearing up of the will by Goshtha in 1921 was to be believed or not, and whether or not the will of 1915 was all along in the iron safe to the knowledge of Susen. It is contended, however, for the accused that the learned Judge misdirected the jury in connection with the charge of criminal breach of trust and that his charge is insufficient on the question of secreting the will. Other points are covered by the Advocate-General's certificate, but I will deal with these two questions.

Upon the question of entrustment, the learned Judge directed the jury as follows :—

"If a person intermeddles with the estate of a "deceased person, he thereby makes himself an "executor of his own wrong and, by making himself "an executor of his own wrong, he imposes on himself

1930

Emperor
v.
Susenbihari Ray.

Rankin C. J.

"the duty of a trustee. So, if a person intermeddles "with the estate of a deceased person, he constitutes "himself an executor and, in a way, a trustee and "there is on him a sort of self-imposed entrustment. "But you must remember that this intermeddling or "dealing with the estate of a deceased person, if he is "in the *bonafide* belief that the estate is his, will "not constitute him an executor of his own wrong and, "therefore, there will be no entrustment; so the whole "thing will turn on the fact whether Susen *bonafide* "believed himself to be the owner of his father "Goshtha's estate. If he *bonafide* believed himself to "be the owner of that property, his action, in dealing "or intermeddling with the estate of Goshtha's, would "not constitute him an executor of his own wrong and "there would be no entrustment. If, on the other "hand, you hold that he did not *bonafide* believe that "he was the real owner of the property after the death "of Goshtha, there would be that intermeddling or "dealing with the property that would constitute him "an executor of his own wrong. The question is a "question of law, but its decision will turn on the "question of fact whether Susen *bonafide* believed "himself to be the owner of property or, in other "words, whether he was under the impression that the "will of 1915 had been torn. There is another aspect "in connection with the question of entrustment to "which I will draw attention. If you believe what "Saraju has told you, namely, that she all along asked "for her share in the property from the accused and "the accused told her 'you will have your share, wait, " 'don't get anxious' or words to that effect, you may "consider whether that was not in a way an "entrustment. Did not Saraju thereby entrust the "accused with dominion over property, namely, the "one-third share which she claims? That is another "aspect from which the question of entrustment may "be considered."

As regards the first part of this direction, I am unable, with the greatest respect to the learned Judge, to agree in this exposition of the law. Indeed, I do

1930

Emperor
v.
Susenbihari Ray.

Rankin C. J.

not think that the case made by the prosecution is in fact a case of criminal breach of trust. A person who intermeddles with the estate of a deceased or does any other act which belongs to the office of executor where there is no rightful executor or administrator in existence is made accountable by the civil law to the extent of all assets which may have come to his hands. No doubt, he may take credit for any assets which he hands over to the rightful executors and also for any payment which he may have made in due course of administration. The estate does not benefit from his wrongful act, but is entitled to hold him liable to account for every penny which may have come to his hands. This, however, is not upon the basis of entrustment, but upon the basis that not being entrusted he had no business to intermeddle. The application of the doctrine in no way depends upon the absence of bad faith in the person intermeddling. The doctrine has been put as follows: "The creditor "is not obliged to seek for the root of any one's "authority whom he finds in possession of the property "which the deceased man left at his death. He may "sue such a person on the foundation of that possession "only and in the event of his doing so, it will be on "the defendant to show not only that he did not in "fact become possessed of the property in either one "of the characters of heir, executor or administrator, "but also to establish that he had a good title to hold "it by some other right. If he is unable to do this, "the Court will hold him liable, as of his own wrong, "to discharge the plaintiff's claim in the same way, "and to the same extent as if he were actually clothed "with one of the three characters, which I have "specified." *Jogendernarain Deb Roykut* v. *Emily Temple* (1). The property which is the subject matter of the counts under section 406, Indian Penal Code, was claimed and obtained by Susen as property to which he was himself entitled as being his father's heir. As the will of 1915 has not yet been admitted to probate, there may be a difficulty in saying that

(1) (1867) 2 Ind. Jur. N. S. 234.

1930

Emperor
v.
Susenbihari Ray.

Rankin C. J.

Susen could have been convicted of criminal misappropriation in respect of these assets under section 403. We have seen that charges under section 404 of the Code were framed but were withdrawn. It may or may not be, upon the facts disclosed by the prosecution case, that Susen was guilty of the offence of cheating and it would certainly seem that, upon the prosecution case, he was guilty of perjury in his evidence before the Subordinate Judge upon his application for a succession certificate. But, in my opinion, it is not sound to hold that he was guilty of the offence of criminal breach of trust upon the basis that he became an executor *de son tort* and this portion of the charge of the learned Judge to the jury amounted to a misdirection.

As regards the latter portion of the direction, which I have cited, I am content to say that I see some difficulty in that portion also. I doubt whether it was open to the jury to hold that, because the accused said to his sister "you will have your share, wait, do not "get anxious" or words to that effect, he became a person whom Sarojbala had entrusted, within the meaning of section 406. It is not necessary, however, to examine this matter further. We are unable to say whether the verdict under section 406 was given upon the basis of the former or the latter portion of the direction to which I have referred and, in my judgment, the convictions and sentences in respect of the charges of criminal breach of trust must be set aside.

I come now to consider whether the learned Judge's charge was sufficient upon the question of secreting the will of 1915. The word "secrete" occurs in the Penal Code, not only in section 477, but in this section we may observe that it is coupled together with such words as "cancels", "destroys", "defaces." In section 204, it is provided that "whoever secretes "or destroys any document which he may be lawfully "compelled to produce as evidence in a court of "justice, or in any proceeding lawfully held before "a public servant as such, or obliterates or renders

1930

Emperor
v.
Susenbihari Ray.

Rankin C. J.

"illegible the whole or any part of such document with "the intention of preventing the same from being "produced or used as evidence before such court or "public servant, *etc.*," commits an offence. In *Subramania Ghanapati* v. *The Queen* (1), a suit had been referred for arbitration to ascertain the amount due to the plaintiff. One of the witnesses, having stated that the payment of a certain sum was endorsed on the bond, the bond was fetched and placed on the floor beside the arbitrator. The accused, who was the defendant, objected to the bond being shown to the witness, but the objection was overruled by the arbitrator. Upon this, the accused suddenly took up the bond and ran out of the house with it. He was followed and requested to return, but declined to return and went away. Turner C. J. said: "The "obvious inference from the circumstances is that, "considering himself aggrieved by the decision of the "point against him, he determined to prevent effect "being given to it, and with that intention removed "the document and subsequently refused to produce "it. He has been guilty of secreting a document he "may be lawfully compelled to produce before a public "servant, an offence punishable under section 204 of "the Indian Penal Code." Again in *Queen-Empress* v. *Muhammad Shah Khan* (2), a report of the commission of a dacoity was made at the *thânâ*. The police officer, in charge of the *thânâ*, took down the report, but subsequently destroyed that report and framed another and a false report of the commission of a totally different offence, to which he obtained the signature of the complainant, and which he endeavoured to pass off as the original and correct report made to him. He was convicted under section 204, Indian Penal Code, for having secreted or destroyed the first signed report. In my opinion, it is reasonably clear that a person may secrete a document not only when the existence of the document is unknown to other persons and for the purpose of

(1) (1881) I. L. R. 3 Mad. 261, 262, 263.

(2) (1898) I. L. R. 20 All. 307

1930

Emperor
v.
Susenbihari Ray.

Rankin C. J.

preventing the existence of the document coming to the knowledge of anybody, but also when the existence of the document is known to others. In the latter case, he may secrete it for the purpose, for example, of preventing it being produced in evidence or for the purpose of raising difficulties in the way of its being produced in evidence. But it is not necessarily enough to show that, upon an occasion upon which it became his duty to produce the document, he failed to discharge that duty, though this may be a cogent piece of evidence in certain circumstances. The fact that a man perjures himself by denying the existence of a document which, to his knowledge, is in his custody would be a still more cogent piece of evidence. But whether the offence of secreting the document is committed or not must depend in each case upon the facts.

Now, the complaint made by the accused before us is that the learned Judge, in his charge to the jury, has not mentioned as a relevant and important circumstance to be considered by them, under section 477 of the Code, the evidence given on the part of the prosecution to the effect that, long before 1929, the existence of this will was well known to Sarojbala and well known to other persons. She was the person chiefly interested in setting up this will. According to her, she and the whole family had known of its existence from the beginning. According to her, Susen had never denied the existence of the will, had repeatedly promised her that she should have the share bequeathed to her thereby. After the father's death, the will remained in the mother's iron safe, that is to say, in the place where one would expect it to be, unless and until it was produced for probate. No evidence is given to the effect that the accused had removed it from one place and put it in another, where it could not have been found. These circumstances, it is said, would not necessarily prevent the jury from finding the prisoner guilty; but they were circumstances which it was very necessary to lay before the jury if a conviction under section 477 was

to be obtained. The learned Judge had so many matters of controversy to canvass in the course of his charge and he has laid so many of them before the jury in an unexceptionable way, that I am most loath to uphold any objection to this charge upon the ground of non-direction, but, upon a careful perusal of the charge, it seems to me that while it is full and clear upon the question whether the jury should believe or disbelieve the story that the will had been torn up, or that the father had thought he had torn it up, the considerations that would arise if this portion of the defence were rejected were not so fully dealt with. The jury were told that, for the establishment of a charge under section 477 there must be two ingredients—secreting the will or document purporting to be the will, and dishonest or fraudulent intention. But I cannot find that the circumstances, bearing upon the question whether the accused should be held in this case to have secreted the document, were marshalled for their assistance. Broadly speaking, on the one hand, the jury would have to consider in favour of the accused the fact that the existence of the will was well known to the family, that it was well known to the person chiefly interested, that she was constantly referring to it, that the accused never denied its existence to her, that he never removed it from one place to another and that he left it all the time in the place in which it would most naturally be sought for. On the other hand, there were the circumstances that he did not produce it for probate, that he had obtained a succession certificate and that he had denied the existence of the document saying that it had been torn up by his father. To weigh these considerations, one against the other, was the function of the jury and the jury had to discharge this function in a case which was overladen with controversy and contradiction as regards the essential facts.

I think, upon the whole, that it was necessary that these circumstances should have been disentangled and that, upon the hypothesis that the jury would

1930

Emperor
v.
Susenbihari Ray.

Rankin C. J.

discredit the defence story of the cancellation of the will, these considerations should have been laid bare to the jury with a certain amount of explanation or comment. The charge of the learned Judge, admirable though it is, does not, in my opinion, go quite far enough, in the sense that it does not deal sufficiently with the considerations that arise after the positive case made by the defence has been put on one side. I, therefore, think that the conviction and sentence under section 477, Indian Penal Code, should be set aside.

In this view, the accused should be acquitted and discharged.

GHOSE J. I agree.

MUKERJI J. So do I.

MALLIK J. I agree that my exposition of the law, on the question of entrustment, in the present case was not quite correct. I do not, however, feel so sure on the question of secreting the will. Suppression of a document may amount to secretion, in my opinion. Undeniably there was suppression of the will in the present case when Susen obtained the succession certificate on the allegation that his father had left no will. In view, however, of the fact that all the circumstances bearing on this part of the case were not presented before the jury, with that amount of fullness which was perhaps necessary, I would not differ from the learned Chief Justice in the order which he proposes to make in this case.

GUHA J. I agree with the learned Chief Justice.

THE COURT. The accused will be acquitted. He being on bail, the order of the Court is that his bail bond be cancelled.

Accused acquitted.

S. M.