APPELLATE CRIMINAL.

Before Lort-Williams and Jack JJ.

1935

Mar. 1, 4, 5, 6, 26.

ABINASHCHANDRA SARKAR

v.

EMPEROR*.

Breach of Trust—Criminal liability, when arises—Charge, what it should be—Indian Penal Code (Act XLV of 1860), s. 405.

A charge under section 405 of the Indian Penal Code, which does not indicate which of the several clauses of that section the offence complained of comes under, and which does not state who made the alleged entrustment, and who suffered from the alleged breach of trust, is indefinite and embarrassing.

When witnesses are produced by the Crown and put forward as witnesses of truth in support of the prosecution case and it is not suggested that they have turned hostile, it is not open to the Crown to suggest that the court should look with suspicion upon the evidence of such witnesses. If they are not truthful witnesses they ought not to be called by the prosecution and so recommended to the court as witnesses of truth.

There is a clear distinction to be drawn between criminal and civil liability. In the absence of proof of dishonest intention to cause loss to a company, the managing agents cannot be held liable for criminal breach of trust even though there has been a breach of contract which indirectly causes loss.

Lanier v. *Rex* (1) referred to.

The success or failure of a business depends upon innumerable fortuitous factors which cannot be enclosed within the straight jacket of a legal principle so as to presume the existence of criminal intention. To suggest that such success or failure can be naturally or probably predicated is to lose all sense of direction.

CRIMINAL APPEAL.

The material facts and the arguments in the appeals appear from the judgment.

A. K. Basu and *Priyanath Bhattacharjya* for the appellant in appeal No. 820.

Debendranarayan Bhattacharjya and *Beerendranath Banerji* for the appellant in appeal No. 821.

*Criminal Appeals, Nos. 820 to 822 of 1934, against the order of S. Sen Chief Presidency Magistrate of Calcutta, dated Sep. 4, 1934.

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G. Gupta and *Beerendranath Banerji* for the appellant in appeal No. 822.

The Deputy Legal Remembrancer, Khundkar, and *Anilchandra Ray Chaudhuri* for the Crown.

Cur. adv. vult.

LORT-WILLIAMS J. The trial of this case was vitiated by several irregularities and illegalities. In the summary form under section 370 of the Code of Criminal Procedure, the offence is stated to be that of criminal breach of trust as managing agents of the Pioneer Assurance Company, Limited, in respect of money entrusted to the accused between 1930 and 1934 by persons concerned with the said company, by criminally misappropriating it. Section 409 of the Indian Penal Code. Further, for aiding and abetting one another in the commission of the aforesaid offence. Section 409/109 of the Indian Penal Code.

But the charge, stated shortly, was:—

1. That the accused managing agents of the company, between the 4th September, 1930, and the 15th November, 1933, were parties to a criminal conspiracy to commit the offence of criminal breach of trust in respect of property entrusted to them or over which they had dominion in the way of their business as managing agents of the company, representing the shareholders, an offence punishable under section 409 of the Indian Penal Code, and in pursuance of this conspiracy various overt acts were committed and criminal breach of trust was committed in respect of certain money, and thereby the accused committed an offence under section 120B read with section 409 of the Indian Penal Code.

2. That the accused at the time and place mentioned in count 1, in furtherance of the common intention of all and in pursuance of the said conspiracy, as managing agents aforesaid, having been entrusted with the said money or having dominion over it, committed criminal breach of trust in respect of it and thereby committed an offence under section 409.

It is not clear, therefore, whether the accused were charged with criminal breach of trust and abetment thereof as stated in the summary form or with conspiracy and criminal breach of trust as in the charge. In any case the charges under section 409 were bad, because they offended against the provisions of the proviso to section 222 (*2*) of the Criminal Procedure Code. They also offended against the

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provisions of section 222 (*1*), because particulars reasonably sufficient to give the accused notice of the matter with which he was charged were not given

The charge was prolix, indefinite and embarrassing. Section 405 of the Indian Penal Code covers dishonest misappropriation, dishonest conversion, dishonest user or disposal in violation of a direction of law, or of a legal contract, or dishonestly suffering any other person to do so. Nothing was stated in the charge to indicate which of these several offences was intended. Nor was it stated therein who made the alleged entrustment, or who suffered from the alleged breach of trust.

The charge of conspiracy suffered from similar defects, and the learned magistrate does not seem to have been very clear about the matter. He seems to have been of opinion that the charge under section 409 was bad, but said nevertheless that a separate sentence under that section was not called for. He convicted the accused of offences under section 120B read with section 409 of the Indian Penal Code and sentenced them each to one day's rigorous imprisonment and to pay a fine of Rs. 500, in default to suffer rigorous imprisonment for 6 months each. In any case, therefore, it would, in my opinion, have been necessary either to set aside the convictions and acquit the accused or, alternatively, to send the case back for retrial.

The facts of the case are comparatively simple when once they are fully comprehended. The Pioneer Assurance Company, Limited, was established in 1930, to carry on insurance business under free insurance or co-operative benefit scheme subject to the restrictions imposed by section 3 of the Provident Insurance Societies Act (V of 1912). Clause 30 of the Articles of Association provided that the three accused, who carried on business in partnership as Mayor & Co., should be appointed managing agents for 15 years certain and should carry on the business of the company subject to the supervision, direction and

control of the Board of Directors. Clause 32 provided that the managing agents were authorised to appropriate: (*i*) 20 per cent. out of the total collection of call fees made for any month plus (*ii*) 10 per cent. of the gross profit and interest accruing to the company's capital and reserve fund and all cash receipts on account of admission and annual fees per each member, towards their own remuneration and all management expenses. Clause 24 provided that the Board of Directors should include three members nominated by the managing agents, and the three accused at all material times were among the number of the directors of the company. Rules were framed under section 5 of the Provident Insurance Societies Act, and rule 9 provided that out of the total collection of call fees made for every month, 20 per cent. would be appropriated towards management expenses including remuneration of the managing agents, office expenses, agents' commission, bonus, advertisement charges, *etc.*, *etc.*, and 10 per cent. towards the reserve fund of the company, and the remaining 70 per cent. would be equally distributed among the claimants, namely, retired member and the heirs or nominees of deceased members, that is to say, those whose claims mature in that month.

The company flourished and business grew rapidly in 1931 and 1932. At the end of that year, cash with the managing agents was certified to be over Rs. 12,000. But troubles began in May, 1933. The other directors began to think that so much cash ought not to be left in the hands of the managing agents, and they appointed a committee of enquiry consisting of two of the directors, N. C. Chaudhuri and A. M. Ghosh, to find out ways and means for the better management of the company. They reported certain irregularities in June, and Mr. N. C. Chaudhuri was appointed supervising director. Matters did not improve and in September the cash in the hands of the managing agents amounted to over Rs. 16,000.

Resolutions were passed by the Board from time to time directing the managing agents to open an

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account on behalf of the company with the Central Bank to be operated upon by the managing agents. This was not done until June, 1932. Up to that time the managing agents kept only one banking account for all their business including that of the company. In October, 1931, the managing agents were directed to deposit in the bank all sums in their hands which belonged to the company. This was not done and, in October, 1933, they were asked to deposit all collections with the bank daily and not to pay any amount except by cheque.

In November, Mr. N. C. Chaudhuri began to press the managing agents to repay the money certified to be in their hands, and in answer they pointed out that the expenses of the company could not be curtailed, and exceeded the amount provided, and that they had had to spend further monies belonging to the company in order to meet current expenses, in the interest of all concerned. The three accused had been present as directors and had taken part in all the meetings at which the resolutions to which I have referred were passed. Mr. N. C. Chaudhuri objected to the managing agents spending the company's funds without the authority of the board, and eventually they were superseded and made over the management of the company to the other directors on November 15, 1933. The books were handed over to Mr. N. C. Chaudhuri. Cash with the cashier was found to amount only to Rs. 71 odd, and a sum of over Rs. 22,000 was alleged by the prosecution to be the amount which ought to have been in the hands of the managing agents and is the subject matter of the present charge. Substantially, this sum, subject to adjustment and subject to an allowance estimated to amount to Rs. 10,000 due to the managing agents for fees outstanding at the date of the termination of their management, is admitted to be owing by them to the company.

Subsequently the Registrar of Joint Stock Companies held an enquiry and the accused stated

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that all the monies shown as cash in their hands had been spent on the company's business—though in excess of the amount allowed by the rules. They proposed to liquidate the amount which on adjustment was found to be due from them by selling their managing agency rights under their agreement to one S. K. Mitra who was willing to buy them. But the Registrar was not satisfied and asked for further information. On February 20th, 1934, the managing agents offered to resign and this was accepted by the directors on the 10th March, and they were asked to render proper accounts. The day before, the Registrar had made a formal complaint to the Deputy Commissioner of Police.

The defence was, and is, that the accused never had any dishonest intention. Far from misappropriating any of the company's funds, they had spent large sums of their own to promote the business of the company. The expenses of management were far in excess of the amount allowed by the rules, and the money stated to be in their hands had all gone to meet them, in addition to considerable sums borrowed by the managing agents on their own responsibility and security, which also they were under obligation to repay. All this was well known to all the Directors at all times, and in October 1933, they recognised the position by sanctioning a scheme for largely increased management allowances. This scheme which would have enabled all accounts to be properly adjusted was obstructed owing to the cupidity of Mr. N. C. Chaudhuri who wanted to step into the shoes of the managing agents and gather the fruit of their labours during the infancy of the company.

The learned magistrate first considered the question of misappropriation and came to the conclusion that the prosecution had failed to prove that the accused had misappropriated any money of the company, that is to say, that they had converted it to their own use. On the evidence, this conclusion seems to have been inevitable. All details of the expense

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of management were admitted to be in the books of Mayor & Co., and there alone. Those books the prosecution did not produce. The evidence of witnesses called by the prosecution that they were handed over to Mr. N. C. Chaudhuri and remained in his custody, though denied by him, was overwhelming. The director, A. M. Ghosh, the Head Clerk, and the cashier all spoke about this, and said that N. C. Chaudhuri had frequently consulted these books, when he was acting as Supervising Director.

The Crown has suggested, though not in so many words, that we ought to look with suspicion upon the evidence of these witnesses, because they belonged to a faction in the company which was not favourably disposed towards N. C. Chaudhuri. A more unusual and a more impossible suggestion, I have never heard advanced. These are witnesses produced by the Crown and put forward as witnesses of truth in support of the case for the prosecution. It has not been suggested that they turned hostile, nor during the whole trial were they treated as hostile witnesses, nor has any one openly suggested that they were not truthful witnesses. The prosecution cannot be permitted to blow hot and cold as best it suits them. If these were not truthful witnesses, they ought never to have been called by the prosecution and so recommended to the court as witnesses of truth. There is no reason whatever for preferring the evidence of N. C. Chaudhuri to theirs, in fact the case as a whole leads me rather to regard his evidence with suspicion than otherwise. The allegation of the accused that he deliberately withheld these books was supported definitely by witnesses for the prosecution, and the learned magistrate had no alternative but to hold that, if produced, they would have supported the contention of the accused that all the money had been spent on the expenses of management of the company's business and none of it had been converted to the use of the accused.

The evidence shows beyond a shadow of doubt that the amount allowed by the rules was at all times

insufficient to meet the expenses of management and it was folly of the accused to go on month after month under such conditions, instead of getting the scheme reconsidered and reconstructed, and they were not authorised by the terms of their agreement to spend other sums belonging to the company in the effort to make ends meet. This, however, is a long way from being proof of dishonesty. Even after practising such rigorous economy that the business of the company fell almost to vanishing point, N. C. Chaudhuri had to admit that he was unable to avoid deficits every month. The evidence makes clear beyond any doubt that the scheme itself was at fault and was unworkable, and that it could be made workable and prosperous and profitable in the interest of all concerned, including both share-holders and policy-holders, only by arranging for a more equitable division of the funds, and allowing a larger share for the costs of propaganda and management. The managing agents are shown to have done their utmost to make the business prosperous for all concerned, under conditions which are shown to have been impossible. In such circumstances, it cannot be said that they acted *mala fide* and the learned magistrate's finding that they acted without due care and caution and so without good faith is not supported by the evidence. The facts that they kept no separate banking account, and entered all costs of management in their own books, and mixed up the affairs of the company with other businesses managed or owned by them, however irregular and unbusinesslike they may have been, are all irrelevant upon this charge, when once it has been found that the accused have not been guilty of dishonest misappropriation or conversion. They are matters of suspicion only and it is not and cannot be suggested that matters such as these have affected in any way the financial position of this company.

The next question to be considered is whether the accused committed criminal breach of trust. The first thing to ascertain is the nature of the alleged

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trust. This is not stated with any definition in the charge. The learned magistrate seems, in one part of his judgment, to have contemplated that the alleged entrustment was by the policy-holders. There is no evidence of any such entrustment. If the policy-holders can be said to have entrusted their money to any one, that entrustment was to the company, not to the managing agents. The accused were acting as agents for disclosed principals. The policy-holders' contract was with the company, not with the agents. The charge is against the accused as managing agents, not as directors of the company.

The only entrustment disclosed by the evidence is the general entrustment by the directors of the company to the agents of money received by the agents on behalf of the company and, in particular, of the cash balances left in their hands. There could not be any such breach of trust as is alleged, if the directors were aware of the employment and expenditure of these funds in and for the business of the company. The evidence is that the directors not only knew of but consented to this expenditure. The most that can be said against this conclusion is that some of the directors did not actively give consent, but deliberately shut their eyes to what they knew or ought to have known was going on. The director A. M. Ghosh proved these facts and said that they all knew. N. C. Chaudhuri said that they were kept in the dark. The prosecution did not call the other directors to give evidence upon this material point and it should be presumed that they would have supported Mr. Ghosh, if they had been called as witnesses. Mr. Ghosh stated that all the directors knew that the money represented as cash in the hands of the managing agents, was not actual cash, because it had all been spent. It is true, as the magistrate points out, that there was no formal resolution giving consent to this expenditure, but in view of the fact that both directors and managing agents knew that this expenditure was being made in contravention of the

rules, it could hardly be expected that any formal resolution would be either passed or recorded.

In the result, the magistrate came to the conclusion that there was no evidence that wrongful gain had accrued to anybody, but that wrongful loss had been caused to the policy-holders and therefore the accused had acted dishonestly. He arrived at this conclusion because the evidence showed that payment of claims had been delayed for considerable periods. There was no reliable evidence to show that the policy-holders would not be paid eventually.

But even supposing that this delay was evidence of loss, it cannot be said that it amounted to wrongful loss. The word "dishonestly" is thus defined in section 24 of the Indian Penal Code—

> Whoever does anything with the intention of causing wrongful gain to one person of wrongful loss to another person, is said to do that thing dishonestly.

Obviously, in view of the facts which I have related, it could not be said that there was evidence of any such intention. The result of what the accused did was the last thing that any of them desired or even anticipated. On the contrary, they strained every nerve and did their utmost to avoid it.

But the learned magistrate considered that they had been guilty of rash and thoughtless extravagance, that it did not require even a common intelligence to foresee that loss would be caused to the policy-holders, that every person is presumed to intend the natural and probable results of his actions, and the accused must, therefore, be held to have intended this wrongful loss caused to the policy-holders. Their conduct was in this sense dishonest and was not only technically but morally reprehensible. He went on to say that they were in every sense of the word trustees of all this public money, that they had not observed the most elementary rules of care and caution but plunged headlong into a wild gamble with the funds entrusted to them and that this had resulted in untold misery to

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hundreds of destitute families. The learned magistrate's conclusion is a good example of the danger of a judge indulging in the charms of rhetoric. There is no evidence of any of the things so graphically described by the learned magistrate. There is no evidence of rash or thoughtless extravagance or of any extravagancy or of any wild gamble or of the untold misery of any one, destitute or otherwise. The evidence is that the amount allowed for management or other expenses under the scheme was not sufficient to make it workable and the supervising director was unable to do any better, even with the most rigorous economy.

No judge or lawyer without an intimate knowledge of business can estimate how much or how little is required to be spent on management, advertisement, and commission agency, in order to ensure success for a newly launched business such as that of the Pioneer Assurance Company, Limited. It depends upon innumerable fortuitous factors of trade, business, market, and particular social conditions about which there is no evidence. The management, advertisement, and commission agency expenses of all insurance companies is notoriously heavy. Their business depends upon their success in persuading members of the public to engage in a gamble, because all insurance is in a sense a gamble, either with misfortune or with death. It should be sufficiently obvious, therefore, that the result of the actions of the accused cannot be attributed to natural laws. To suggest that the success or failure of a business such as this, is something which can be naturally or probably predicted is to lose all sense of direction. Such matters cannot be enclosed within the straight jacket of a legal principle, so as to presume the existence of a criminal intention against an accused, of which there is not a tittle of evidence. Upon this point the learned magistrate has clearly misdirected himself and this error has vitiated his conclusions which, but for this error, seem to have been substantially correct.

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The Crown, however, has asked us to disregard the findings of the magistrate and examine the evidence anew, and we have done so. The result is to show without doubt that monies belonging to this company have been spent by the accused in clear contravention of the rules. It may also be that the directors have published false balance sheets by setting down cash balances which they knew were no longer in existence. Offences under the Provident Insurance Societies Act, 1912, are punishable as therein provided and are irrelevant to the present discussion. But I am satisfied that these monies were spent upon the business of the company and that the accused have not been guilty of either criminal misappropriation or conversion. I believe that this expenditure was made with the full knowledge of the directors of the company and there was no breach of trust or breach of contract as between the accused and the company. Even if it were the fact that there had been such a breach of contract, which indirectly had caused loss to the policy-holders, I am satisfied that the accused did not intend to cause such loss and did not act dishonestly within the meaning of the sections. There is a clear distinction to be drawn between criminal and civil liability and the remarks of Lord Shaw of Dunfermline in the case of *Lanier* v. *Rex* (1), at page 229, are of interest upon this point.

For these reasons, the convictions and sentences must be set aside and the accused must be acquitted.

The fines, if already paid, must be refunded to the appellants.

JACK J. I agree in the order of acquittal on the charge framed. It has been proved that the managing agents in many cases during the last year instead of paying out as required by the rules within 4 months the amounts due to the representatives of the policy-holders who had died used the money in defraying the expenses of the Pioneer Insurance

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Company, thus disposing of the funds in violation of a contract between them and the directors of the company, and they did so dishonestly, inasmuch as they thereby caused wrongful loss to the representatives of the deceased. However, the accused managing agents cannot be held to be criminally liable inasmuch as the evidence seems to show that the directors were aware of and acquiesced in the breach of the contract. Owing to this acquiescence it is the directors of the insurance company who appear to be criminally liable to the representatives of the policy-holders in acquiescing in the financial policy and methods of the managing agents. The directors appear to have dishonestly violated their contract with the policy-holders in allowing to be used for expenses monies which under the trust were to be used in paying off the death distributions. There was also a violation by the directors of the company of the rules under the Provident Insurance Act (section 5) as to the manner in which the trust was to be discharged and it is they, in relation to the proportion of the funds to be disbursed for expenses of management, who are responsible to the representatives of the deceased policy-holders for the violation of the legal directions in so far as they have caused wrongful loss by such violation and appear to be criminally liable under section 409 of the Indian Penal Code. They might also have been prosecuted under the Provident Insurance Societies Act, sections 21 and 22.

Accused acquitted.

A. C. R. C.