REVISIONAL CRIMINAL.

1895
January 14

Before Mr. Justice Aikman.

QUEEN-EMPRESS *v.* KELLIE.

Act No. XLV of 1860 (*Indian Penal Code*), *s.* 409—*Criminal breach of trust—Conviction for criminal breach of trust on general deficiency in account.*

An accused person may be charged with criminal breach of trust in respect of a general deficiency, and it is not necessary in all cases to charge the accused with the embezzlement of a particular sum received on a certain date from some particular person. *Reg.* v. *Lloyd Jones* (1) ; *Reg.* v. *Chapman* (2) ; *Reg.* v. *Wolstenholme* (3) ; and *The Queen* v. *Lambert* (4) ; referred to.

THIS was an application for revision of an appellate order of the Sessions Judge of Cawnpore sustaining the conviction of the applicant for the offence of criminal breach of trust as an agent, punishable under s. 409 of the Indian Penal Code. The applicant, Archibald Kellie, was the agent at Cawnpore of the firm of Messrs. Ullmann Hirschhorn & Co., the head office of which is in London. The firm has a branch in Calcutta which imports piece-goods, thread, &c., and sells them through its agents. It was Kellie's duty to sell in Cawnpore the goods sent him by the Calcutta branch and to remit the proceeds to Calcutta. He was also bound to send to Calcutta cash abstracts showing his transactions. He had been dilatory in sending in his accounts, and in consequence of this Mr. Tilemann, the manager of the Delhi branch, and Mr. Sonderegger, an assistant in the Calcutta branch, met at Cawnpore, and on the 28th of August 1894 checked Kellie's accounts. According to those accounts, which were in Kellie's own handwriting, he ought to have had in hand a cash balance of Rs. 3,041-0-8 ; but all that he had was Rs. 113-7-0, there being thus a deficiency of Rs. 2,927-9-8. In respect of this deficiency Kellie was charged with the offence punishable under s. 409 of the Indian Penal Code and convicted, and his appeal was dismissed by the Sessions Judge.

The judgment of Aikman, J., after stating the facts as above, thus continued :—

Mr. *C. Ross Alston*, for the applicant.

(1) 8 C. and P., 288.
(2) 1 C. and K., 119.
(3) 11 Cox. Cr. Ca. 313.
(4) 2 Cox, Cr. Ca. 309.

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The Government Pleader (Munshi *Ram Prasad*), for the Crown.

The case for the petitioner has been well argued by *Mr. Ross Alston*. The main ground relied on by the learned counsel for the petitioner is that a conviction for criminal breach of trust on a general balance of account is bad in law.

In support of this he referred to *Reg.* v. *Lloyd Jones* (1). In that case Alderson, B., observed :—"It is not sufficient to prove at the trial a general deficiency in account. Some specific sum must be proved to be embezzled, in like manner as in larceny some particular article must be proved to have been stolen." The cases of *Reg.* v. *Chapman* (2) and *Reg.* v. *Wolstenholme* (3) were also relied upon.

The propriety of these rulings has been doubted even in England. With reference to the ruling in *Reg.* v. *Lloyd Jones*, the following remarks are made in Roscoe's Criminal Evidence, 10th edition, page 477 :—"When a person is employed in the receipt and payment of money, it is almost impossible to prove anything more than a deficiency in account, and if the words of Alderson, B., in *Reg.* v. *Jones* (1) were to be taken in their strict sense, it would be impossible ever to procure a conviction for embezzlement when there were running accounts between the parties." And the author goes on to suggest that there was in the case referred to some misapprehension of the principles of law applicable to the question. I would also refer to the case of *The Queen* v. *Lambert* (4) decided in 1847. In that case, when the cash in the hands of the accused, an employé in the Customs Department, was checked, it was found to be short by £270 of the amount which, according to his books, ought to have been in his possession. The accused had by virtue of his employment both to receive and pay away money on account of Government. It was contended on his behalf that the charge could not be supported in the absence of evidence to prove the appropriation of any particular sum from any one person. Erle, J., said :—I think that the offence is sufficiently made out, within the

(1) 8 C. and P., 288.
(2) 1 C. and K., 119.
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(4) 2 Cox. Cr. Ca. 309.

meaning of the statute, if the jury are satisfied that the prisoner received in the aggregate the amount with which he appears to have charged himself and that he absconded or refused, when called upon, to account, leaving a portion of the gross sum deficient. There would be constant failure of justice if I were to decide otherwise, since it is impossible in cases like the present, where a number of different amounts of money have been received, to specify which sum or sums or the part of which sum or sums have been embezzled."

But, be the law in England what it may, I have no hesitation in holding that, according to Indian law, an accused person may be charged with criminal breach of trust in respect of a general deficiency, and that it is not necessary in all cases to charge the accused with the embezzlement of a particular sum received on a certain date from some particular person. It is enough if the accused person has sufficient notice of the accusation he has to meet, and that he had in the present instance.

To hold otherwise would, to use the words of Erle, J., result in a "constant failure of justice." It was further argued by the learned counsel for the petitioner, on the strength of the ruling in the case *Rex* v. *Edward Hodgson* (1), that, as the prisoner's accounts were not shown to be incorrect, there was therefore no embezzlement, but merely a default of payment. But it is not in respect of accounts that a charge is made in such cases; it is in respect of the disappearance of a certain sum of money. The accounts may be kept in a faultless manner whilst peculation is going on; on the other hand, it is possible to imagine that accounts may be kept in a slovenly manner and that there may be many omissions in them, even whilst any suspicion of dishonesty is negatived. In the case referred to by the learned counsel it was said:—"If the prisoner regularly admits the receipt of the money, the mere fact of not paying it over is not felony. It is but matter of account." In this case, however, there was something more than the mere fact of not paying over the balance.

(1) 3 C. and P., 422.

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It appears from the evidence of Mr. Tilemann and Mr. Sonderegger that when questioned as to this deficiency Kellie admitted that he had taken the money, and their evidence is borne out by the terms of a letter (Exhibit G.) written by Kellie to Mr. Sonderegger on the 30th of August 1894.

The learned counsel for the applicant also addressed the Court in mitigation of sentence. The punishment which has been sustained was a sentence of two years' rigorous imprisonment. Having regard to the circumstances of the case, I am of opinion that this punishment was not a bit too severe. This was not the case of an employé yielding on a solitary occasion to temptation. A large amount was embezzled, and it appears from the evidence of Mr. Sonderegger that Kellie admitted that peculation had been going on for some eighteen months. The nature of the defence set up by the applicant does not tell in his favor, as it amounted to an insinuation that the missing amount had been taken by Messrs. Tilemann and Sonderegger, an insinuation which I concur with the lower Courts in thinking to be baseless.

For the above reasons I reject the application and direct that the records be returned.

APPELLATE CIVIL.

1895
January 22.

Before Mr. Justice Knox and Mr. Justice Aikman.

HAIDAR SHAH (APPLICANT) *v.* JAMNA DAS AND OTHERS (OPPOSITE PARTIES).*

Civil Procedure Code, ss. 350, 359—*Insolvency—Powers exercisable by Court under s.* 359—*Withdrawal of application by applicant without permission to renew—Court not competent to make payment of costs a condition precedent to the granting of permission to withdraw.*

A Court acting under s. 359 of the Code of Civil Procedure may, on the motion of a creditor under certain circumstances, order the imprisonment of an applicant for a declaration of insolvency, or it may, under certain circumstances of its own motion, send the applicant to be dealt with by a Magistrate; but it cannot, unless moved by

* First Appeal No. 91 of 1893, from an order of A. M. Markham, Esq., District Judge of Meerut, dated the 12th June 1893.