decreed to the plaintiffs by a sum of Rs. 500. In other respects the decree of the court below will stand. We direct that the parties shall pay and receive costs in proportion to failure and success in both courts.

Appeal allowed.

APPELLATE CRIMINAL.

1910
November 22.

Before Mr. Justice Richards and Mr. Justice Tudball.

EMPEROR, v. KADIR BAKHSH.*

Act No. XLV of 1860 *(Indian Penal Code), section* 409—*Criminal Misappropriation—Evidence—What prosecution has to prove.*

On a charge under section 409, of the Indian Penal Code it is not necessary for the prosecution to prove in what manner money alleged to have been misappropriated has actually been disposed of by the accused. If it is shown that money entrusted to the accused was not accounted for nor returned by him in accordance with his duty, if unspent, it lies on the accused to prove his defence.

THE facts of this case were as follows:—The accused was a process-server attached to the court of the Munsif of Fatehabad. On the 25th September, 1909, he was given a number of summonses for service together with the sum of Rs. 26-8-0, for diet money of the witnesses to be served. The summonses were returnable by the 5th October. On the 13th October he was given another batch of summonses, returnable on the 22nd November, together with Rs. 18 for diet money. The summonses were not returned on the due dates nor was any report made by the accused as to their service, or non-service, nor was the money returned. On demand being made the accused afterwards returned the summonses unserved, but did not even then refund the diet money, merely saying that it was lost. He never made any report either to the police or to his superior officer of the loss of the money and failed to give any satisfactory explanation of this omission. Subsequently he refunded the whole of the amount. He was prosecuted under section 409 of the Indian Penal Code. His defence was that he had been robbed of the money. The trying Magistrate found him guilty and sentenced him to six months' imprisonment. On appeal the Sessions Judge was of opinion that the prosecution had failed to establish the charge and

* Criminal Appeal No. 680 of 1910 against an order of Muhammad Ishaq Khan, Sessions Judge, Farrukhabad, dated the 30th of April, 1910.

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acquitted him. The Sessions Judge made the following remarks in his judgement, after setting out the facts as above-mentioned :— "On the other hand the prosecution has not produced any evidence to establish conclusively that he had misappropriated the money to his own use. There were two decrees out against him at that time, but it has not been shown that he used that money for payment of those decrees. The prosecution ought to have shown by some evidence that the amount with the embezzlement of which he has been charged had in reality been appropriated by him to his own use and that his defence was groundless." The story of the accused that the accused had been robbed was not regarded by the Sessions Judge as established. On this point he remarked :—"It is true that his defence on the face of it does not appear to be very convincing, but it does tend to throw some doubt on his guilt." The Local Government appealed against the acquittal.

The Government Advocate (Mr. *A. E. Ryves*) for the Crown :— The Sessions Judge is wrong in law in holding that on the facts found the prosecution has failed to establish the charge. On an indictment under section 409, Penal Code, it is not incumbent upon the prosecution to prove that any sum was spent by the accused for himself, or brought to his own use on any specific occasion. The prosecution has proved that the accused failed, on the due date, to return the summonses, served or unserved, and to refund the money entrusted to him or give a satisfactory explanation for his default. A sufficient *primâ facie* case was thereby made out, and it then rested on the accused to prove that he had a sufficient and satisfactory justification for his default. He has failed to do so, and he should, therefore, have been convicted. Its no defence that the money was subsequently refunded.

Mr. *D. R. Sawhny*, for the accused :—

Under section 101 of the Evidence Act it is entirely upon the prosecution to prove the guilt of the accused. It should be established by clear evidence that he committed a misappropriation in fact. Mere delay or negligence in rendering prompt account of the money is not enough to establish his guilt. He could be rightly convicted if he had declined to account for the money or made a false account. No specific act of misappropriation has

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been proved. I rely on the case of *Imam Din* v. *The Emperor* (1).

RICHARDS and TUDBALL, JJ.—Kadir Bakhsh was charged under section 409, Indian Penal Code, on two counts with criminal misappropriation of certain money entrusted to him. The learned Magistrate convicted and sentenced the accused to six months' rigorous imprisonment on each charge to run concurrently. The learned Sessions Judge reversed the finding of the Magistrate and acquitted the accused. Government has appealed. Most of the facts connected with the case are practically undisputed. The accused is a process-server. He received on the 25th of September 1909, from the Munsif's Court, Rs. 26-8-0 as diet-money for witnesses and then again he received Rs. 18 on the 13th of October, 1909. The first summonses should have been returned on the 5th of October and the second lot on the 22nd of November. The accused did not return the summonses until the 9th of December, 1909, when he returned them unserved, but without the money. He stated that the money was lost. Between the 15th of December, 1909, and the 17th of December, 1909, the accused made good the money. The evidence showed that there were decrees out against the accused which he was apparently unable to satisfy. The evidence also showed that the accused when asked to return the summonses stated that some of them had been served and some of them not. This statement of the accused was untrue, because the summonses were all finally returned unserved. The evidence further showed that until the summonses were returned unserved the accused never made any report of the loss of the money either to the police or to his own superior officer. The learned Sessions Judge says in dealing with the case:—"His defence was that he had lost the money while suffering from severe illness, but he failed to explain why he did not report the alleged loss to the police or his own superior officer. No satisfactory explanation is given as to this omission. On the other hand the prosecution has not produced any evidence to establish conclusively that he had misappropriated the money to his own use. There were two decrees out against him at that time, but it has not been shown that he used that money for payment of those decrees.

(1) (1901) 3 Punjab, I. L. R., 157.

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The prosecution ought to have shown by some evidence that the amount with the embezzlement of which he has been charged had in reality been appropriated by him to his own use and that his defence was groundless." In our opinion the learned Sessions Judge is quite wrong in the proposition which we understand him to lay down in this paragraph of his judgement. There is no doubt that if the accused had shown that he had really been robbed of the money he would not be guilty of the offences with which he is charged. It is also true that if the evidence for the defence coupled with the surrounding circumtances and the statement of the accused himself created a doubt in the learned Sessions Judge's mind as to the guilt of the accused, the latter would be entitled to get the benefit of that doubt. But it is entirely wrong to suggest that it lay on the prosecution to prove the actual mode of misappropriation of the money. They were not called upon to prove that he applied this money in the discharge of the decrees against him or in any other way. When they proved that he had not returned the money in accordance with his duty when he returned the summonses unserved, the Crown had proved their case, and it lay on the accused to prove his defence. We might refer the learned Judge to the provisions of section 114 of the Indian Evidence Act. The learned Judge himself seems to have altogether disbelieved the story of the alleged loss, which is unsupported by any evidence. No doubt some evidence was given that the accused was ill. But it by no means follows that because the accused was ill, he was robbed of the money. We think on the evidence that the conclusion arrived at by the learned Magistrate was right and that arrived at by the learned Sessions Judge was wrong. On the other hand, when we come to consider the question of punishment, we think that we ought to take into consideration the good character which the accused has borne, also the fact that he made good the money which he had misappropriated, and that it is possible also that he will lose his office, and taking all these matters into consideration we do not intend that the accused should be kept any longer in jail. We allow the appeal and finding the accused guilty of two offences under section 409, Indian Penal Code, we sentence the accused to six weeks' rigorous imprisonment on each count, the sentences to run concurrently. As

the accused has already served more than six weeks pending the appeal to the Sessions Judge, the result of order will be that the re-arrest of the accused will be unnecessary and the bail bond will be discharged.

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Appeal allowed.

APPELLATE CIVIL.

1911

November 24.

Before Mr. Justice Richards and Mr. Justice Tudball.

CHATARBHUJ AND ANOTHER (DEFENDANTS) *v.* CHATARJIT AND ANOTHER (PLAINTIFFS) AND HAR PRASAD (DEFENDANT.) *

Hindu law--Gift—Gift in favour of an idol which is to be subsequently consecrated—Possession given to manager.

By a deed of gift certain zamindari property was expressed to be given to an idol which was not at the time of execution in existence and possession of the property was made over to a certain person as *pujari*. *Held* that the deed was valid and created a trust in favour of the idol. *Mohar Singh* v. *Het Singh* (1) and *Bhupati Nath Smrititirtha* v. *Ram Lal Maitra* (2) referred to.

THE facts out of which this appeal arose were as follows :—

Mathura Prasad and Chhatarjit acquired a certain share in a village. They made a gift of it in favour of "Thakur Ramlalaji Mandir (or Dewalaya), mauza Kailiya," an idol which was not then in existence, and, appointing one Bhola as *pujari* and manager of the said idol, made over the property to him for the idol. After Mathura Prasad's death his widow and the other donor, Chhattarjit, sued to have the gift set aside on the ground that the gift was void. The courts below set aside the gift. The defendants appealed to the High Court.

The Hon'ble Pandit *Sundar Lal* (with him Dr. *Tej Bahadur Sapru*), for the appellants :—

The validity of the gift does not depend on there being any idol of that name ; the gift was in favour of a specific deity. I rely on *Mohar Singh* v. *Het Singh* (1) and *Bhupati Nath Smrititirtha* v. *Ram Lal Maitra* (2). These were cases of wills, but on principle there is no difference between a bequest and a gift of this kind.

* Second Appeal No. 310 of 1910 from a decree of J. C. Smith, District Judge of Jhansi, dated the 3rd of February, 1910, modifying a decree of Udit Narain Singh, Subordinate Judge of Jhansi, dated the 21st of June, 1909.

(1) (1910) I. L. R., 32 All., 337. (2) (1909) I. L. R., 37 Calc., 128.