Before Justice Sir George Knox.

EMPEROR *v.* KARIM-UD-DIN.*

1918
April, 18.

Act No. XLV of 1860 *(Indian Penal Code), section* 408—*Embezzlement as a clerk or servant—Misjoinder of charges.*

A station master on the East Indian Railway, under an arrangement with the Company, received a fixed allowance in respect of the marking, loading and unloading work at his station and used to engage his own men for that purpose. One of such men, engaged as a marksman, was first allowed to keep certain registers, which it was the duty of the station master to maintain, and next allowed to receive cash payments and make entries in the cash register. Whilst so employed, he received a sum of Rs. 5-10-0 as an overcharge or demurrage in respect of certain goods which passed through his hands, and appropriated the same. To this sum, however, the Railway Company made no claim. He was also alleged to have received and appropriated to his own use two other sums of money under somewhat similar circumstances. In respect of these three sums he was tried and convicted on three counts under section 408 of the Indian Penal Code.

Held, the offence, if any, committed with regard to the sum of Rs. 5-10 did not fall within section 408 at all, and, this being so, the joinder of the three charges in one trial was illegal.

THE facts of this case were as follows :—

One Raghunath Prasad, station master of Sirathu station on the East Indian Railway, had entered into an arrangement with the Railway authorities, under which he employed his own men to do the marking, loading and unloading work at the station. The station master got a certain allowance for the performance of this work, and himself paid the men engaged by him. The accused Karim-ud-din had been engaged by him as a marksman, whose duties were to mark the packages received at the station. Raghunath Prasad, however, got or allowed Karim-ud-din to write certain registers which the station master should have kept himself. Raghunath Prasad went on leave and was succeeded by Rikhi Lal, who allowed Karim-ud-din to receive the cash payments and to make the entries in the cash register. It did not appear that the Railway authorities had ever sanctioned, or were even aware of, this state of things.

The allegation against Karim-ud-din was that he demanded an over-charge of Rs. 5-10-0 from one Babu Lal, in respect of goods consigned and appropriated the money himself, and that he also misappropriated two other sums received by him from other

* Criminal Revision No. 85 of 1918, from an order of F. D. Simpson Sessions Judge of Allahabad, dated the 22nd of December, 1917.

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consignees of goods. He was charged with three offences under section 408 of the Indian Penal Code in respect of these three sums and was tried at one trial for them. He was convicted and sentenced to six months' rigorous imprisonment on each count. On appeal, the Sessions Judge affirmed the conviction, but reduced the sentence to four months on each count. The accused applied in revision to the High Court.

Babu *Piari Lal Banerji*, for the applicant :—

The charge with respect to the first item of Rs. 5-10-0 could not possibly constitute an offence under section 408 of the Indian Penal Code. The money which Babu Lal, the consignee, was made to pay, over and above the correct amount due, was not money due to the Railway Company. The Railway Company denied Babu Lal's liability to pay the excess demanded, and repudiated the demand and the realization made by the accused. The money, therefore, was not money belonging to or due to the Railway Company, nor had it ever come into their hands. It could not, therefore, be said that the accused was entrusted with the money and that he misappropriated it. The case of *Queen-Empress* v. *Imdad Khan* (1) is instructive in connection with this point. The offence, if any, in respect of the first item, was that of cheating and it was brought in under section 408, Indian Penal Code, to allow of a joint trial. The trial was, therefore, illegal. Further, the accused was merely a servant of Raghunath Prasad or of Rikhi Lal, and was not a "clerk or servant" of the Railway Company, nor was he "entrusted in such capacity" with property; consequently, he could not be convicted under section 408 of the Indian Penal Code. The Railway Company had never authorized the entrusting of cash to the accused.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown :—

Although the Railway Company may not have actually engaged the accused as its servant, he was, in actual fact, acting in that capacity and using his position as such servant to obtain the money. Having chosen to take upon himself the position and responsibilities of a clerk of the Railway Company, and as such to get hold of the money, he cannot repudiate that position.

(1) (1885) I. L. R., 8 All., 120.

He received the excess amount on behalf of the Railway Company and he is accountable to the Company for it. His appropriation of the money to his own use is, therefore, criminal misappropriation. He cannot be allowed to say that, notwithstanding his actual performance of the duties and responsibilities of a clerk in the employment of the Railway, and the recognition by the general public of such performance, he was in reality not such a clerk, as he had not been duly appointed. I rely on the case of *Queen-Empress* v. *Parmeshar Dat* (1).

Babu *Piari Lal Banerji*, in reply :—

That case deals with a "public servant," which expression is specially defined in section 21 of the Indian Penal Code, and expressly includes every person "who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation."

KNOX, J.—Karim-ud-din has been convicted of three offences, each offence under section 408 of the Indian Penal Code, and has been sentenced to six months' rigorous imprisonment on each offence, the sentences to run consecutively. It appears from the record and the arguments addressed to me that station masters on the East Indian Railway get some kind of allowance from the Railway in return for goods despatched by the Railway to be marked and loaded or otherwise handled. The station master Raghunath Prasad appointed Karim-ud-din and gave him Rs. 10 a month for doing this work. There was no contract of any kind between the East Indian Railway Company and Karim-ud-din. Raghunath Prasad appears to have made or permitted Karim-ud-din to write a number of Railway registers. It is not for a moment asserted that the East Indian Railway Company sanctioned this allotment of work to Karim-ud-din or were in any way cognizant of it. Raghunath Prasad took leave and was succeeded by one Rikhi Lal. Rikhi Lal appears to have gone a step further than Raghunath Prasad in employing Karim-ud-din on this kind of work and to have given him the cash registers to write up. The result, or alleged result, of these proceedings was that certain items of money disappeared. The accused was charged with embezzling three separate different items. The nature of these

(1) (1886) I. L. R., 8 All., 201.

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items is somewhat different. The first item is an item of Rs. 5-10-0. The prosecution allege that this was an over-charge upon certain goods consigned through the East Indian Railway to one Sat Narain. Sat Narain appears to have paid the sum under protest, and to have written to the Railway Company on the point. The item was represented in a letter, the writing of which is traced to the accused, but the signature on the writing is that of Rikhi Lal. The money never came into the hands of the East Indian Railway Company. It was described as a demurrage charge, while I understand that the Railway have never put it forward as money due to them either on account of goods consigned or of demurrage thereon. The other two items are of the same description, but for the purpose of this revision I need not go into them. The contention raised before me is that with reference to the first item no offence coming within section 408 of the Indian Penal Code has been proved and the trial of the accused for the three offences under section 408 of the Indian Penal Code is illegal, a joint trial of the three items not being allowable by law. It is really round this first charge that the argument in revision centres. I accept the plea that, even if the facts be considered proved, the first is not an offence which falls within section 408 of the Indian Penal Code. Karim-ud-din was neither clerk nor servant of the Railway Company, he was not employed as a clerk or servant of theirs, and not being so he could not be entrusted in such capacity with this sum of Rs. 5-10-0. It is contended before me that Karim-ud-din having chosen to take upon himself the duties and responsibilities of a clerk of the East Indian Railway Company, must be regarded as a clerk and cannot afterwards say that he is not such a clerk, and my attention was called to the case of *Queen-Empress* v. *Parmeshar Dat* (1). There is, however, an important difference in the case cited and the present case. Parmeshar Dat was recognized by the authorities as filling the position of a public servant. There was no such recognition in this case, nor can I suppose that there would ever have been such a recognition. The probabilities are that, if the attention of the East Indian Railway Company had been called to the fact th at this marksman was posting up registers and receiving moneys,

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they would have utterly refused to recognize him and would have called Rikhi Lal to account for such an irregularity. Then further, my attention was called to what was argued, how far the sum of Rs. 5-10-0 taken under the circumstances stated would come at all under the crime of embezzlement. It was not property of the East Indian Railway Company; it was repudiated as not being their property, and whatever may have been the offence committed in respect of that Rs. 5-10-0 it was not the offence of embezzlement. The joint trial under the circumstances was illegal. I quash it and set aside the convictions and sentences. Karim-ud-din must be released.

Conviction set aside.

Before Mr. Justice Piggott.

EMPEROR v. AMIR HASAN KHAN.*

1918
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Act (Local) No. II of 1916 *(United Provinces Municipalities Act), section* 307—*Disobedience to notice lawfully issued by a Municipal Board—Recurring fine—Procedure necessary to imposition of daily fine.*

A Magistrate convicting an accused person of an offence under section 307(*b*) of the United Provinces Municipalities Act, 1916, cannot, by the same order, further sentence him to a recurring fine in the event of non-compliance with the order of the Board.

The liability to a daily fine in the event of a continuing breach has been imposed by the Legislature in order that a person contumaciously disobeying an order lawfully issued by a Municipal Board may not claim to have purged his offence once and for all by payment of the fine imposed upon him for neglect or refusal to comply with the said order. The liability will require to be enforced, as often as the Municipal Board may consider necessary, by the institution of a second prosecution, in which the questions for consideration will be, how many days have elapsed from the date of the first conviction under the same section during which the offender is proved to have persisted in the offence, and, secondly, the appropriate amount of daily fine to be imposed under the circumstances of the case, subject to the maximum prescribed.

THIS was a reference made by the Sessions Judge of Cawnpore.

The facts of the case are fully set forth in the judgment of the Court.

Babu *Sital Prasad Ghosh*, for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

PIGGOTT, J.—The learned Sessions Judge of Cawnpore has referred to this Court in revision two orders passed by a Magistrate

* Criminal Reference No. 186 of 1918.