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Thakur Sheodat Singh v. *Thakur Bishunath Singh* (1), is against the appellants' contention. So we do not feel hampered in the view which we have taken, by any course of decisions in this province against it.

We are, therefore, of opinion that the present appeal ought to have been filed in the court of the District Judge. We accordingly direct that the memorandum of appeal should be returned to the appellants for presentation to the proper court. The appellants will pay the costs of the respondents in this Court.

Srivastava and Pullan, JJ.

APPELLATE CRIMINAL.

Before Mr. Justice A. G. P. Pullan.

SHIAM SUNDAR (APPELLANT) *v.* KING-EMPEROR (COMPLAINANT-RESPONDENT).*

1930 *November, 24.*

Criminal Procedure Code (Act V of 1898), section 222—Misappropriation—Conviction for Criminal Misappropriation, whether permissible without proof of specific sums misappropriated—Proof required for a conviction for criminal misappropriation.

It is impossible for the prosecution to follow the money in the hands of an accused person and prove that he spent a certain specific item in any particular manner. The prosecution must stop when it is proved that the accused has received the money, has acknowledged the receipt and has failed to pay it to his master or show it in his master's accounts. *King-Emperor* v. *Kadir Bakhsh* (2), referred to.

Section 222, clause (2) of the Code of Criminal Procedure was primarily enacted so that persons who showed a deficiency in the accounts with which they were entrusted could be convicted of criminal misappropriation even when it could not be shown that they had misappropriated this or that specific sum. *Emperor* v. *Mohan Singh* (3), *Samiruddin Sarkar* v. *Narain Chandra Ghose* (4), and *Emperor* v. *Bhatkhande* (5), relied

*Criminal Appeal No. 459 of 1930, against the order of Sham Manohar Nath Shargha, Additional Session Judge of Unao, dated the 17th of October, 1930.

(1) (1903) 6 O.C., 255.
(2) (1910) 8 A.L.J.R., 88.
(3) (1920) I.L.R., 42 All., 522.
(4) (1904) I.L.R., 31 Calc., 928.
(5) I.L.R., 48 Bom., 119.

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on, *Buddhu* v. *Babu Lal* (1), *Queen-Empress* v. *Kellie* (2), *Thomas* v. *Emperor* (3), and *K. K. Mukerjee* v. *King-Emperor* (4), referred to.

Mr. *J. M. Basu*, for the appellant.

The Assistant Government Advocate (Mr. *Ali Muhammad*), for the Crown.

PULLAN, J. :—The appellant Shiam Sundar was the Munim of Lala Dwarka Nath, Taluqdar of Maurawan. He has been convicted on three counts of offences under section 408 of the Indian Penal Code and he has been sentenced to five years' rigorous imprisonment on each charge, the sentences to run concurrently. The learned Sessions Judge has written a long and elaborate judgment in which he has given in full all the accounts which were kept by this man for the period of one year during which the offences are said to have been committed. There are three charges: two of specific acts of embezzlement and one of a general defalcation evidenced by the deficiency in his balance at the end of the year. This last charge is supported by the evidence of the account books kept by the accused himself and he has been unable to show either that he has entered the accounts correctly or that he has handed over to his master the court balance. On the contrary in many cases the *kachchi rokar* showed different totals from the *pakki rokar*. At times where his balance showed a deficit he has entered fictitious items as deposits made by himself in order to square the totals, and when he was finally called upon to pay in the balance in hand he only paid in a sum of Rs. 335 odd, whereas his accounts showed, according to the learned Sessions Judge, that he should have had in hand at that time over Rs. 1,771. I may remark that the Judge has cut down this sum. According to the evidence it was considerably more. In appeal the learned counsel for the accused has attacked the conviction on the two specific items on

(1) (1895) I.L.R., 18 All., 116.
(2) (1895) I.L.R., 17 All., 153.
(3) (1906) I.L.R., 29 Mad., 558.
(4) (1924) 29 C.W.N., 54.

the ground that there is no definite proof that the accused took this money. It is true that there is no proof as to how he dealt with the money but it is proved without doubt that he received both these items, one of Rs. 15-6-11 on the 26th of September, 1928, and the other of Rs. 175 on the 12th of June, 1929, from ziladars of his master, that he gave receipts for them and that he himself signed *arz irsals* which showed that these items had been paid in. Yet there is no mention of either item in the accounts and he never handed in these sums to his master or complained that he had given receipts without receiving the money. It is consequently too late for him to make that defence now and I hold that it is proved that he received both these items, that he did not pay them to his master, that he did not enter them into his accounts and I must infer from that that he misappropriated both these items to his own use. Generally speaking, it is impossible for the prosecution to follow the money in the hands of an accused person and prove that he spent a certain specific item in any particular manner. The prosecution must stop when it is proved that the accused has received the money, has acknowledged the receipt and has failed to pay it to his master or show it in his master's accounts. See *King-Emperor* v. *Kadir Bakhsh* (1).

The learned counsel for the appellant has challenged the conviction on the third charge on the ground that a conviction on a general deficiency is not in accordance with section 222 of the Code of Criminal Procedure. Before the passing of the present Act a Bench of the Allahabad High Court ruled in the case of *Buddhu* v. *Babu Lal* (2), made the following observations :—

> "Where an agent or servant has received over a period of time several sums on behalf of his employer, and has, during the same time, expended moneys on behalf of or made payments to his employer, but still

(1) (1910) 8 A.L.J.R., 88. (2) (1895) I.L.R., 18 All., 116.

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a deficiency was left, for which the agent or servant would or could not account, it might be impossible to fix him with the embezzlement of any particular item received by him, although, taking the items proved on both sides of the account and his course of conduct, it might be obvious that he had embezzled a large sum of money, namely, the difference between the amounts received and those expended and accounted for."

Their Lordships then said that the question of liability in such a case had been decided by Mr. Justice AIKMAN in *Queen-Empress* v. *Kellie* (1) and they agreed with that decision and therefore held that a servant charged with an offence of this nature could be legally convicted. I have been asked to consider that the law as laid down by the learned Judges of the Allahabad High Court is not good law in view of the provisions of section 222 of the present Code of Criminal Procedure of the year 1898. The second clause of that section runs as follows :—

> "When the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed."

Commenting on this section as far back as the year 1901 a Bench of the Madras High Court in the case of *Thomas* v. *Emperor* (2), observed that they were unable to accept the argument addressed to them that section 222 was only intended to apply to cases where there is a general deficiency of account, and this ruling has led to many rulings by other High Courts to the effect that a number of specific charges may be included in one charge framed in accordance with the provisions of this

(1) (1895) I.L.R., 17 All., 153. (2) (1906) I.L.R., 29 Mad., 558.

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section. There is, as far as I know only one ruling of any High Court which takes the point of view that a conviction on a general deficiency of accounts is improper. This is to be found in the case of *Emperor* v. *Mohan Singh* (1). But I observe that in that case the learned Judge only expressed a grave doubt as to whether the form of the charge in which it was sent to the Sessions Judge was one which the Judge ought to have entertained and he gave his own opinion that section 222 was meant for a case where a man is charged with embezzling the gross sum by which he appears to have meant the total of items embezzled as distinct from the difference between the sums actually received and the sums actually credited. It is probable that the learned Judge accepted the view of law taken in England by certain authorities that at a trial for embezzlement it is not sufficient to prove a general deficiency in account. But in England there is a conflict of authority on this question, and in India the courts have to construe not the English law but the Indian Codes. A Bench of the Calcutta High Court in the case of *K. K. Mukerjee* v. *King-Emperor* (2) considered the object of the amendment made in the Code of Criminal Procedure by the introduction of sub-section (2) of section 222. The learned Judges pointed out that it was not to amend the Penal Code but merely to get rid of a technical difficulty in framing the charge As the law then stood it was difficult to convict, where there was a running account and the prosecution was unable to put their hand on specific items out of which the particular sum was embezzled. There is, therefore, no question that the learned Judges were of opinion that section 222,, clause (2), was primarily enacted so that persons who showed a deficiency in the accounts with which they were entrusted could be convicted of criminal misappropriation even when it could not be shown that they had misappropriated this or that specific sum. In an earlier case in *Samiruddin Sarkar* v. *Narain Chandra*

(2) (1924) 29 C.W.N., 54. (1) (1920) I.L.R., 42 All., 522.

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Ghose (1), the same High Court held that a man who had realized by 23 rent receipts a sum of Rs. 103 and misappropriated out of this the sum of Rs. 67 could be properly convicted on a charge framed in accordance with section 222. And the Bombay High Court in *Emperor* v. *Bhatkhande* (2), has taken the same view as the Calcutta High Court and distinguished the Allahabad ruling to which I have referred—*Emperor* v. *Mohan Singh* (3).

In the present case the accused is shown to have kept false accounts. These accounts were checked by one Deokinandan and the learned Sessions Judge has considered this man to be an expert and has accepted for the most part his evidence. The accused, who is himself a Munim and should at least understand his own accounts, has made no serious attempt to explain what he has done with the money which he is shown to have received and which he entered wrongly in his accounts. He made an elaborate written statement and when he was examined in court his usual reply to any question was that it was contained in his written statement even when it is not. For the rest he contended himself with making foolish allegations as to his master. It is certainly difficult to say with certainty the amount which he embezzled but the learned counsel has been unable to show any item on which the learned Sessions Judge can be held to have gone wrong. He finds that the total deficiency apart from the two specific items was Rs. 1,771-7-1 and this sum was embezzled in the course of a single year. In my opinion the conviction was proper in law and in accordance with the evidence. As to the sentence I do not consider that it is excessive and I accordingly dismiss this appeal and uphold the conviction and sentence on all counts. The accused must surrender to his bail.

Appeal dismissed.

(1) (1904) I.L.R., 31 Calc., 928. (2) I.L.R., 43 Bom., 119.
(3) (1920) I.L.R., 42 All., 522.