CRIMINAL REVISION.

Before Mr. Justice Mackney.

VASANJEE KHIMJEE *v.* KANJI TOKERSEY.*

1937

July 12.

Criminal breach of trust—Duty of employee to collect moneys in a foreign country—Remittance to and accounting at firm's place of business—Failure of employee to account and remit—Place of offence—Place where offence triable—Penal Code, s. 405—Criminal Procedure Code, s. 181 (2).

The accused, an employee of the complainant at Akyab, was sent to Cochin, there to receive consignments of rice shipped by the complainant's firm from Rangoon and Akyab and to sell the rice. The accused was to submit accounts and pay the net cash balance resulting from the sales to the complainant's firm at Akyab. Instead of doing so the accused went away to his native country from Cochin without returning to Akyab to account for and pay in the moneys which came into his hands in the business at Cochin. The complainant filed a complaint for criminal breach of trust against the accused before a magistrate at Akyab.

Held, that the magistrate at Akyab had no jurisdiction to try the offence, as it was not committed in Akyab. Although a person may have to account for money, it is not the failure to account, but the misuse of the money for dishonest purposes, which constitutes the offence. The money was not received or retained by the accused at Akyab. Further the failure by the accused to remit or bring the money occurs at the place where the accused is, and not in the place where the money is to be sent or brought.

Emperor v. *Mohru Lal*, I.L.R. 58 All. 644, dissented from.

De for the applicant.

MACKNEY, J.—The applicants are a firm of merchants at Akyab. They filed a complaint in the Court of a Magistrate at Akyab against the respondent Kanji Tokersey. The complaint alleged that the respondent

* Criminal Revision No. 337B of 1937 from the order of the Sessions Judge, Arakan, in Criminal Revision No. 454 of 1936.

1937

KHIMJEE v. TOKERSEY.

MACKNEY, J.

was an employee in the service of the firm at Akyab but was subsequently admitted as a partner. It was agreed that he should go to Cochin, there receive consignments of rice sent by the firm both from Akyab and Rangoon and sell it there. He was required to submit accounts and pay the net cash balance resulting from the business to the firm at Akyab: but did not do so. Further, whilst he was in Cochin he realized a sum of Rs. 7,000 on behalf of the firm in a Court of law. This sum also he failed to remit or account for. The total amount which was left in the respondent's hands was Rs. 31,980. The respondent then closed the business in Cochin but instead of returning to Akyab to submit his accounts and pay the money in, he proceeded at once to his native place in Cutch.

The Magistrate held that he had no jurisdiction to try the alleged offence because it had not been committed in Akyab. An application to the Sessions Judge of Akyab to revise this order was also dismissed. The applicants have now come before this Court.

The appropriate section of the Criminal Procedure Code is section 181 clause (2) which states that—

> "The offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person, or the offence was committed."

Now, there can be no question that wherever else the alleged misappropriated property was received or retained by the respondent it was not so received or retained in Akyab, so that if the offence is to be tried in Akyab it must be held that it was committed in Akyab. A difficulty that arises is the fact that a person can hardly be said to commit an offence in a place which he never visits.

1937

KHIMJEE v. TOKERSEY.

MACKNEY, J.

The definition of " criminal breach of trust " is to be found in section 405 of the Indian Penal Code which reads :

" Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits ' criminal breach of trust '."

Now, it is quite clear that the respondent must have either left the money in Cochin or he must have taken it elsewhere. If he had left the money in Cochin then it would appear that he may have committed a breach of trust by so doing and, obviously, the offence was committed in Cochin. If he took the money somewhere else it is equally clear that he must have misappropriated the money in Cochin because it was there that he failed to do with the money that which it was required of him to do, namely, send it to the firm at Akyab, but removed it elsewhere.

I have been referred to the case of *Emperor* v. *Mohru Lal* (1). This is a case very similar with the present one. The complainant resided in Cawnpore and employed the accused to sell goods for him in Bengal, realize the price thereof and either personally bring the proceeds to Cawnpore or remit the money to Cawnpore. The accused failed to remit all the money that he collected and he absconded and could not be traced. It was held that the Court at Cawnpore had jurisdiction to try the case. The view taken was that the accused was not charged with having

" misappropriated or converted to his own use the money at any particular place and his offence consists in failing to carry

(1) (1935) I.L.R. 58 All. 644.

1937

KHIMJEE v. TOKERSEY.

MACKNEY, J.

out his contract and remit the money or bring the money to Cawnpore. He was guilty of an illegal omission. Section 43 of the Indian Penal Code lays down that a person is said to be 'legally bound to do' whatever it is illegal in him to omit. He was legally bound to remit this money to Cawnpore and he failed to do so."

The learned Judges then remarked,

"He therefore committed an offence within the jurisdiction of the Magistrate in Cawnpore by his illegal omission to send or bring the money to Cawnpore. We consider therefore that the Magistrate at Cawnpore had jurisdiction to try this case."

In an earlier part of the judgment at page 647 the learned Judges say—

"The accused may have been perfectly innocent when he collected this money and his criminal offence occurred later when he failed to remit the money or to bring it to Cawnpore."

Now, it seems to me that this is perhaps to state the matter too broadly, if I may say so with the greatest respect, because it might well be that a person might fail to remit the money, or bring it to the place to which he had to bring it, through causes beyond his control. The failure to remit the money or to bring it to the place to which he had to bring it does not necessarily constitute the offence of criminal breach of trust. Although a person may have to account for money, it is not the failure to account, but the misuse of the money for dishonest purposes, which constitutes the offence. The words used in section 405 are "dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property." No doubt it will be a necessary part of the evidence against the accused that he failed to account when he should have accounted. As was remarked by the learned Judges in this same case at page 649,

"Where there is a violation of a direction of law or a legal contract, the proof of that violation may be by negative evidence that the direction of law or the contract has not been fulfilled."

But it is with the sentence which immediately follows this sentence, that I find myself unable to agree. They say,

"We are of opinion that where the direction of law or the contract requires that the accused should dispose of the property at a particular place, then the court having jurisdiction at that place will have jurisdiction to try the offence of the second part of section 405 of the Indian Penal Code where there is a charge that the accused has failed to comply with the direction of law or the legal contract and has failed to carry out his duty at that place."

But if the accused fails to remit or bring money where does that failure occur? It occurs at the place where the accused is, not in the place to which the money is to be sent or brought. So, even on this view of the law it appears to me that as the omission to send the money has taken place in some other spot than Akyab, the Courts at Akyab cannot have jurisdiction. If it be said that the offence was constituted because the respondent failed to come to Akyab that omission to appear in Akyab cannot be said to have taken place at Akyab. The respondent omitted to come to Akyab in the place where he happened to be. Even a sin of omission cannot be committed by a sinner in a place where the sinner is not. This aspect of the matter does not appear to have presented itself to the learned Judges who decided the case of *Emperor* v. *Morhu Lal* (1).

In my opinion, the view taken by the lower Courts in the present matter is correct and this application is dismissed

(1) (1935) I.L.R. 58 All. 644.