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already said, are open to question under the present law. The accused has presumably already suffered the imprisonment to which he was sentenced for the second offence. We see no reason to interfere in revision and direct the papers to be returned to the District Magistrate.

MIRZA, J. :—I agree.

Answer accordingly.

R. R.

CRIMINAL APPELLATE

Before Mr. Justice Fawcett and Mr. Justice Mirza.

EMPEROR *v.* BYRAMJI JAMSETJI CHAEWALLA.*

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December 12

Indian Penal Code (Act XLV of 1860), section 408—Criminal breach of trust—Exact amount misappropriated need not be proved.

On a charge of criminal misappropriation, it is sufficient if the prosecution establishes that some of the money mentioned in the charge has been misappropriated by the accused, even though it may be uncertain what is the exact amount so misappropriated.

Queen-Empress v. *Waman*,[1] followed.

THIS was an appeal by the Government of Bombay from an order of acquittal passed by H. P. Dastur, acting Chief Presidency Magistrate of Bombay.

The accused, who was a cashier in a firm, was charged with the offences of criminal breach of trust as a servant in respect of an aggregate sum of Rs. 39,942-3-7 and destruction of accounts, punishable under sections 408 and 477A of the Indian Penal Code, 1860.

The trying Magistrate acquitted the accused on the grounds that a general charge of Rs. 39,942-3-7 could not stand and that when such a general charge was made, it was not legal to convict the accused even if the evidence showed that he had committed a defalcation of some indefinite amount.

*Criminal Appeal No. 350 of 1927.

[1] (1893) Ratanlal's Crim. Cas. 659.

The Government of Bombay appealed against the order of acquittal.

P. B. Shingne, Government Pleader, for the Crown.

G. N. Thakor, with *V. N. Chhatrapati*, for the accused.

FAWCETT, J. :—This is an appeal by Government against the acquittal of an accused person, who is charged with criminal breach of trust as a clerk under section 408 of the Indian Penal Code. The charge against him was that he had committed criminal breach of trust in respect of a sum of Rs. 39,942-3-7. The Acting Chief Presidency Magistrate acquitted him on the ground that, in view of certain admissions of the complainant and some difference between the account, Exhibit A, on which the prosecution relies and the accounts of certain merchants, it was evident that the charge of having misappropriated this exact amount of Rs. 39,942-3-7 could not stand. He goes on to say :—

" When such a general charge is made it is not legal for a Court to hold that though the accused cannot be held guilty of misappropriating such a large amount, the evidence does show that he has misappropriated at least a large sum though the Court cannot definitely say what that amount is."

He also says :—

" So that it is in my opinion very unfair to the accused to say that though it cannot be proved that he has committed a defalcation to the extent of Rs. 39,942-3-7, yet on the evidence I hold that he has committed a defalcation of some indefinite amount; it may be Rs. 100 less or it may be Rs. 4,000 less. Such a charge would be absolutely illegal."

On this ground he declined to go into the merits of the case and the various contentions of the prosecution and the defence, and held that the accused was entitled to an acquittal on the above point.

In my opinion after hearing full arguments, the general proposition laid down by the Magistrate is too wide and cannot be accepted. So far as the charge is concerned, it certainly is a proper charge allowed by

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the provisions of sub-section (2) of section 222, and no valid complaint can be made about it. The only question is whether a person cannot be convicted of embezzlement, or criminal breach of trust, in cases where the prosecution are unable to say that a specific amount of money has actually been embezzled. It seems to me that this is the clear meaning of the Magistrate's judgment. Mr. Thakor for the accused has contended that the Magistrate means to say that the prosecution has not been able to show that at least some sum of money must have been misappropriated by the accused, and that this opinion is based on an appreciation of the evidence in the case. If that is what the Magistrate meant, it certainly is not clearly expressed in the passages, of which I have given the substance; and it seems to me that he lays down a general proposition that it is illegal to convict an accused person for misappropriation in a case where the evidence shows that he has misappropriated at least some money, although the Court cannot definitely say what the amount misappropriated actually is; so, I think, we must deal with the case upon that construction of his judgment.

Certain authorities have been cited to us. Of these certainly the most relevant is *Khirode Kumar Mukerji* v. *King-Emperor*.[1] The judgment there does contain some remarks that support the view taken by the Magistrate in this case. In particular, the following passage has been strongly relied upon, viz. (p. 56) :—

"The offence of criminal breach of trust involves entrustment or dominion over property and dishonest misappropriation, conversion, use or disposal thereof. It is not possible to find these elements unless one can form a conception as to what that property is. There must therefore be a definite finding of a certain definite sum traced to the accused in order to form the basis of his conviction."

[1] (1924) 29 C. W. N. 54.

I entirely agree that it is not possible to find the elements necessary for conviction of the offence of criminal breach of trust in respect of property, unless "one can form a conception as to what that property is." But it does not seem to me to be a necessary conclusion from that premise that there must be a definite finding of a certain definite sum traced to the accused in order to form the basis of his conviction. That is rather extending the first proposition, because you certainly can have a conception as to what has been misappropriated without necessarily knowing the exact amount misappropriated. If the evidence is sufficient to establish that, at any rate, some property, such as money, has been misappropriated, it seems to me that it is against reason and authority to say that, because you cannot specify the exact amount that has been misappropriated, the accused cannot be convicted. A case which, I think, supports this view is the one to which I drew the attention of Mr. Thakor, viz., *Queen-Empress* v. *Waman*.[1] In that case, an Inamdar, the owner of a forest, obtained in October 1891 a book of passes authorizing him to issue the same for the transit of forest produce belonging to himself. Between October 1891 and March 1892, he issued fifty of these passes covering forest produce (i.e., *hirdas* or myrabolams) exceeding altogether ten khandis; of these about one khandi may have belonged to the Inamdar, and the rest, it was presumed, belonged to Government; but it could not be made out what particular pass or passes covered the produce belonging to the Inamdar. The Inamdar was prosecuted in respect of passes issued for the myrabolams, over and above his own, and was convicted by a Magistrate—who, I may remark, was myself—under sections 411 and 109, Indian Penal Code. The charge as framed by the Magistrate was in general

[1] (1893) Ratanlal's Crim. Cas. 659.

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terms with reference to all the transactions between October 1891 and March 1892. On appeal the Sessions Judge amended the conviction and found the Inamdar guilty of an offence under section 411 of the Indian Penal Code, in respect of the myrabolams covered by the passes issued on March 30, 1892. The High Court held that the alteration of the conviction by the Sessions Judge was unnecessary, that the general charge as framed by the Magistrate was correct, and that the accused could be convicted under section 414, in that it was clear that some at least of the *hirdas* must have been Government property, although it was not established what was the exact quantity of *hirdas* that the accused had assisted in disposing of or the particular occasions on which he made that disposal; and this conclusion was arrived at after a re-hearing of the case, in which Mr. Inverarity represented that both the charge and the conviction were absolutely erroneous. That, I think, is a clear authority against the view taken by the Magistrate. The only other case to which I think it necessary to refer is *Emperor* v. *Mohan Singh*.[1] In that case, according to the report at page 523, a prosecution was started against the accused on charges which amounted rather to charges of a general deficit on the whole of his accounts than of the misappropriation of definite and specific items, and the judgment naturally animadverts upon the danger of convicting a person on some vague or general notion, when the real charge has not been established. I do not think that that particular criticism applies to the present case. There is a definite charge against the accused of having misappropriated a certain amount of money, and the question whether the prosecution has failed to establish that the accused has actually misappropriated anything still remains open. My

[1] (1920) 42 All. 522.

present remarks have nothing to do with that question; but what I do dissent from is the proposition that it is incumbent upon the prosecution to establish that a definite sum has been misappropriated. In my opinion, it is sufficient if the prosecution establishes that some of the money mentioned in the charge has been misappropriated by the accused, even though it may be uncertain what is the exact amount so misappropriated. That there need not be absolute certainty as to "the thing in respect of which" an offence is committed, to use the language of sub-section (1) of section 222 of the Criminal Procedure Code, is sufficiently shown by the case of an alternative charge of perjury in respect of two conflicting statements, the validity of which is recognised in Schedule V of the Code. Therefore, in my opinion, the Magistrate was not justified in summarily acquitting the accused in the manner that he did. I would admit the appeal, set aside the acquittal and direct the present Chief Presidency Magistrate to make a further enquiry into the case. By that I do not mean that any further evidence need be called—in fact, I presume that all evidence relied upon by either side had been called—but that he should hear arguments as regards the evidence and decide the case upon its merits.

MIRZA, J. :—I am of the same opinion. It is clear from the judgment of the learned Magistrate that he has based his acquittal of the accused on the construction he has placed on section 222 of the Criminal Procedure Code. From that construction we differ. The learned Magistrate has not considered the evidence in the case, nor has he recorded any definite finding in respect of any sum that may have been misappropriated by the accused. He states that the complainant has admitted that all cash payments made by the firm had not been shown in arriving at the figure of

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Rs. 39,942-3-7. He also mentions that there is some difference in the accounts of the merchants and in the statement making up the figure of Rs. 39,942-3-7. From a consideration of those two points, he expresses an opinion that the prosecution has failed to prove a criminal breach of trust in respect of the item set out in the charge, and what remains of the case of the prosecution would be a charge of criminal breach of trust in respect of an item, which is indefinite. It may be possible on a consideration of the present evidence to arrive at a definite conclusion as to the amount in respect of which a criminal breach of trust has been committed by the accused. That enquiry, in our opinion, will be better conducted by the learned Chief Presidency Magistrate, who has heard a great part of the evidence and has had the opportunity of observing the demeanour of witnesses in the case.

I concur in the order proposed by my learned brother.

Acquittal set aside.

R. R.

CRIMINAL REVISION

Before Mr. Justice Fawcett and Mr. Justice Mirza.

EMPEROR *v.* BHAGA MANA.*

1927 December 20

Indian Penal Code (Act XLV of 1860), section 186—Obstruction to public servant—Obstruction to agent of public servant.

The complainant, a public servant, went with a menial to the compound of the accused to remove an encroachment on Government land. While the menial, under the orders of the complainant, was putting his scythe to the hedge to cut it, the accused caught hold of the scythe and threatened him. The complainant, therefore, apprehending violence, retired. On a prosecution of the accused for an offence punishable under section 186 of the Indian Penal Code :—

Held, that the act of the accused in actually laying hold of the scythe was an act of physical obstruction which came under section 186 of the Indian Penal Code.

*Criminal Application for Revision No. 350 of 1927.