

APPENDIX.

Before Mr. Justice Kemp (Offg. C. J.), and Mr. Justice Ainslie.

THE QUEEN *v.* RAJKRISHNA BISWAS (PETITIONER.)*

1871
Sept. 25.

*Criminal Breach of Trust—Penal Code (Act XLV of 1860), s. 406—
Dishonesty—Evidence—Conviction—Act I of 1871.*

THE accused, one Rajkrishna Biswas, was charged with having committed criminal breach of trust in respect of a pony, which had strayed and been confined in the pound at the station of Dumjar under the Cattle Trespass Act No. I of 1871, by appropriating the same to his own use when it was his duty as Sub-inspector in charge of the Police Station of Dumjar to have sold the animal by public auction under the provisions of the aforesaid Act. The accused alleged that the pony had been regularly sold by public auction in full compliance with the law, entries of which fact and of the amount realized had been duly made in the station and the pound-keeper's book, and the money transmitted to the Magistrate's office; that the pony then passed through two hands, and was ultimately purchased by him from the last owner, who had no further need of the pony, and had expressed an intention to his neighbours of selling it, for his boy, who had taken a fancy to the animal. The Officiating Magistrate of Howrah disbelieved the evidence of the several successive purchasers and those present at the alleged auction sale and the entries in the Police Station and pound-keeper's books, which were admittedly made by the witnesses for the prosecution, who were the immediate subordinates of the accused. He held upon the evidence that no sale took place, though all the preliminaries to the sale had been performed, and that the possession by the accused commenced from the time when the pony had been at his request tied to a Kudum tree where the intended sale was to have been held. He therefore convicted him of criminal breach of trust under section 406 of the Indian Penal Code, and sentenced him to a fine of 25 rupees, or, in default, to rigorous imprisonment for ten days. In his judgment the Magistrate observed that the amount credited to Government as sale proceeds was nearly the full value of the pony.

Mr. Sandel move the High Court (AINSLIE, J.) under section 404 of the Criminal Procedure Code to send for the record of this trial, and quash the conviction and sentence as being contrary to law.

The Court sent for the record.

* Miscellaneous Criminal Appeal, No. 133 of 1871.

1871

THE QUEEN
v.
RAJKRISHNA
BISWAS.

Mr. *Sandel*, for the petitioner, contended that there was no evidence that the accused had been in any manner entrusted with the pony, or with any dominion over it, or that he had dishonestly dealt with it; that the finding of the Court below was opposed to such supposition; that the possession of impounded cattle remains with the pound-keeper, who is declared to be responsible for such cattle till actually disposed of: see Act I of 1871, sections 9 and 19. The petitioner was merely the salesman. The latter part of section 19 of the Act declared that "no pound-keeper shall release or deliver any impounded cattle otherwise than in accordance with the former part of this chapter." [AINSLIE, J.—Section 19 prohibits a police officer from purchasing at these sales, directly or indirectly, so that section 169 of the Penal Code would meet this case.] Section 169 could only apply when there had been a sale. In this case the Magistrate found that there was really no sale, which was also the case set up by the prosecution. No doubt the accused in his defence admitted that there was a sale, but he also declared that he came by the pony several months after honestly, and that the sales of the pony previous to his purchase were all *bona fide* transactions.

The judgment of the Court was delivered by

KEMP, J.—The petitioner Rajkrishna Biswas has been convicted, 'by the Officiating Magistrate of Howrah, of the offence of Criminal breach of trust, and has been sentenced, under section 406 of the Indian Penal Code, to pay a fine of 25 rupees, or to suffer rigorous imprisonment for a period of ten days. It appears that the petitioner was a Sub-inspector of Police stationed at the Thanah of Dumjari. A pony mare was brought to the pound at the station, and after certain preliminaries were observed to bring about the sale of the pony, which had been kept for some time in the pound, the petitioner purchased the pony for Rs. 6. Under section 19 of Act I of 1871 "no officer of Police shall, directly or indirectly, purchase any cattle for sale under this Act." The petitioner before the Magistrate alleged that there had been a sale under the Act, and that one Gapi Nath Sarder had purchased the pony for 4 rupees, and that an entry had been made in the diary to that effect. Subsequently the petitioner purchased the pony, after it had passed from Gapi Nath to another party, who again sold it to the Sub-inspector.

The Magistrate, however, has found on the evidence that no sale took place, and as we have already observed, has convicted the petitioner under section 406. Now, to constitute the offence of criminal breach of trust it must be shown that the petitioner was entrusted with this property, that is with this pony, or had dominion over this pony, and that he dishonestly mis-appropriated or converted to his own use that pony. There must be an intention proved on the part of the petitioner to cause wrongful gain or wrongful loss to constitute the offence of criminal breach of trust. The Magistrate in his finding and sentence clearly states that the petitioner paid almost the approximate value of the animal. It is

to be regretted in this case that the Magistrate did not proceed under section 19 of Act I of 1871 taken with section 169 of the Penal Code, but as the Magistrate has found on the evidence that no sale took place, and has convicted the petitioner under section 406, we must hold as a point of law that the petitioner has not committed any such offence as to bring him under the provisions of section 405,—namely, that he has not dishonestly misappropriated or converted this pony to his use. We therefore think that the conviction must be set aside, and the fine refunded.

1871

THE QUEEN
v.
RAJKRISHNA
BISWAS.

Before Mr. Justice Bayley and Mr. Justice Paul.

MUSSAMAT ANISUL FUTWA AND ANOTHER (DEFENDANTS) v. MUS-SAMAT CHANDO (PLAINTIFF) AND OTHERS (DEFENDANTS).*

1871
July 5.

Duty of an Appellate Court—Defect in Investigation—Insufficiency of Finding.

Munshi Mahomed Yusuff for the appellants.

Messrs. C. Gregory and R. E. Twidale for the respondents.

THE facts of the case and the arguments are sufficiently noticed in the judgment of the Court which was delivered by

PAUL, J.—In this case the plaintiff sued the defendants (the vendor and his vendee) to recover possession of certain property sold by the first defendant to the second, on the ground that he was entitled to pre-emption by right of partnership—i. e., by reason of being a *Shafi Khalit*.

The plaintiff alleged that at one time he and the first and second defendants or their ancestors were joint, but that a partition had taken place, by reason of which the defendant No. 2, viz., the present purchaser, or his ancestor, became separate in respect of the very lands in suit from the plaintiff and from the defendant No. 1 who continued joint. The plaintiff therefore had to establish that the defendant was a stranger before he could succeed in obtaining from his hands the whole of the property in suit, and the onus of proving that there was a partition or separation lay on the plaintiff.

The first Court for reasons which appear to be somewhat strong, came to the conclusion that no partition had taken place; that the plaintiff and the defendant were *Shafi Khalits*; and, holding that the plaintiff had not performed the preliminaries, dismissed the plaintiff's suit.

The lower Appellate Court, making careful investigation and sensible remarks, has come to the conclusion that the prescribed preliminaries for

* Special Appeal, No. 109 of 1871, from a decree of the Subordinate Judge of Gyah dated the 26th November 1870, reversing a decree of the Moonsiff of that district, dated the 28th March 1870.