CRIMINAL REVISION.

Before Mr. Justice Caspersz and Mr. Justice Sharfuddin.

1911

July 12.

UTTAM CHAND

v.

EMPEROR.*

Master and servant—Ganja—Illegal possession of ganja by servant acting on his own behalf and beyond the scope of his employment—Liability of the master for the act of the servant—Bengal Excise Act (Beng. V of 1909), ss. 46(a) and 56.

To support a conviction under s. 56 of the Bengal Excise Act, it is necessary to show not only that a servant was in the employ of the master, but also that he was acting within the scope of his employment and for the benefit of the latter.

Where a servant, whose duty was to remain at his master's shop and to conduct the business there, was found travelling to another place with *ganja* in his possession, in contravention of s. 46(*a*) of the Act :—

Held, that the master could not be convicted under s. 56, as his servant acted beyond the scope of his employment and for his own private purpose.

Suffer Ali Khan v. *Golam Hyder Khan* (1) referred to.

Emperor v. *Haji Shaik Mahomed Shustari* (2) distinguished.

THE petitioner, Uttam Chand, was the licensee of several excise shops in nine districts of East Bengal, including a *ganja* shop at Koilwar, in the district of Arrah. On the 23rd January 1911, one Lakhichand Ram, employed by the petitioner at the above *ganja* shop, was found on the road from Arrah to Bindhyachal, in the United Provinces, with $2\frac{1}{2}$ seers of *ganja* which he was transporting to the

* Criminal Revision, No. 649 of 1911, against the order of A. Hayat, Deputy Magistrate of Arrah, dated April 27, 1911.

(1) (1866) 6 W. R. Cr. 60. (2) (1907) I. L. R. 32 Bom. 10.

latter city. He was tried under s. 46(*a*) of the Bengal Excise Act (Beng. V of 1909), and convicted thereunder, on 6th February, by Mr. A. Hayat, Deputy Magistrate of Arrah. A prosecution was thereafter, on the report of the Sadar Excise Sub-Inspector of Arrah, started against the petitioner under s. 56 of the Act, and he was tried and convicted by the same Magistrate of such offence on the 27th April, and fined Rs. 200. It appeared that on the day of Lakhi's arrest the petitioner was at Bogra. The trying Court found that it was on account of the petitioner having an extensive business in the excise trade that he could not properly look after his numerous servants at his various shops, and that it was due to laxity of supervision on his part that Lakhi was able to leave the Koilwar shop and go to Bindhyachal with the *ganja* for sale there. The Magistrate was also of opinion that it was "extremely probable" that the *ganja* was taken from the petitioner's shop.

Mr. A. Caspersz and *Babu Surendra Kristo Bose*, for the petitioner.

The Offg. Deputy Legal Remembrancer (Mr. Sultan Ahmed), for the Crown.

CASPERSZ and SHARFUDDIN JJ. The petitioner, Uttam Chand, has an extensive business in excise shops, of which he holds a considerable number in nine districts of this province, including a *ganja* shop at Koilwar, in the district of Arrah. His Koilwar servant, Lakhichand, was convicted, under section 46 of the Bengal Excise Act (V of 1909), for being in possession of 2½ seers of *ganja* which he was attempting to transport from Arrah district to Bindhyachal. Lakhichand confessed his guilt.

The question now is whether the conviction of the petitioner, the master of Lakhichand, can be

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supported on the language of section 56 of the Act. The section is as follows :—" When any offence punishable under section 46 is committed by any person in the employ and acting on behalf of the holder of a license granted under this Act, such holder shall also be punishable as if he himself had committed the offence, unless he establishes that all due and reasonable precautions were exercised by him to prevent the commission of such offence."

In the opinion of the convicting Magistrate, the petitioner has so many servants and so much business to attend to, that it was due to laxity of supervision on his part that his servant Lakhichand was able to leave his Koilwar shop and commence travelling to Bindhyachal with 2½ seers of *gania*.

The substantial grounds argued on this Rule are two in number. With regard to the fourth ground specified in the petition, there is no finding in the judgment of the convicting Magistrate, that the 2½ seers of *ganja* belonged to the petitioner, that is, came from his Koilwar shop. The Magistrate says :—" It is extremely probable that he (Lakhichand) took the *gania* from the Koilwar excise shop of the accused." That, however, is not a sufficient finding on which to implicate the master of Lakhichand. The other ground, the third in the petition, is that Lakhichand was acting outside the scope of his employment, and was not acting on behalf of the petitioner when he committed the offence under section 46(*a*) of the Excise Act.

Section 46 enumerates various offences, and we think that, if a master is to be held liable for all the acts of his servants, his liability must extend to all parts of section 46. As we put it to the learned Deputy Legal Remembrancer, who appeared to show cause, "if his servant, Lakhichand, had cultivated

ganja in the garden of his own private residence, would the master be liable for that act?" The only possible answer to this question is in the negative.

The language of section 56 is very clear, and does not in any way conflict with the general principle alluded to in *Suffer Ali Khan* v. *Golam Hyder Khan* (1). namely, that a master is not criminally responsible for the wrongful act of a servant, unless he can be shown to have expressly authorised it. That case was one of mischief, but the principle is of extensive applicability. Under section 56 the prosecution must show that Lakhichand was not only in the employ of the petitioner, but also acted on his behalf. In removing the *ganja* from his shop, Lakhichand was, presumably, committing a criminal offence. His business was to remain at the Koilwar shop, and there to conduct sales for the petitioner; but when he travelled beyond the scope of that business, it is not possible to implicate the petitioner in his acts which were not done for the benefit of the petitioner, but rather for Lakhichand's private purposes. The expression "on behalf of" connotes some *benefit* to the person on whose behalf another person may act.

Various authorities have been cited to us on constructions of the Arms Act, the Opium Act and the Bengal Motor Car and Cycle Act. We have examined them all, but we have not derived such assistance from them as would warrant a detailed discussion. There is one case, to which we may allude, namely, *Emperor* v. *Haji Shaik Mahomed Shustari* (2), which was cited to us by the learned Deputy Legal Remembrancer, but it does not carry his arguments any further than the principle we have already mentioned.

(1) (1866) 6 W. R. Cr. 60. (2) (1907) I. L. R. 32 Bom. 10.

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No doubt when a servant does anything within the scope of his employment for that purpose, his action will be binding on the master, and the master will be criminally liable for any wrongful act of the servant. In the particular case cited, which was under the Indian Emigration Act (XXI of 1883), the master was deemed to be so liable.

In these circumstances, we think, the conviction cannot be supported. It is therefore set aside, and the Rule made absolute. Any fine paid or levied will be refunded.

E. H. M. *Rule absolute.*

CRIMINAL REVISION.

Before Mr. Justice Stephen and Mr. Justice N. R. Chatterjea.

1911

Nov. 9.

TUNOO MIA

v.

EMPEROR.*

Thumb-impression—Evidence—Taking of thumb-impression out of Court without objection made—Admissibility of such impression in a subsequent trial for giving false evidence—Evidence Act (I of 1872), s. 132, and Proviso—Penal Code (Act XLV of 1860), s. 193.

Where a Magistrate, believing that the complainant had given false evidence in the course of a trial, by denying the fact of a previous conviction, had his thumb-impression taken out of Court, for the purpose of identification in a future prosecution under section 193 of the Penal Code, and there was nothing to show that the latter had objected to the taking of it :—

Held, that the thumb-impression was admissible in a subsequent trial for giving false evidence, and that the proviso to s. 132 of the Evidence Act was not applicable, inasmuch as (i) the taking of such an impression was not equivalent to asking a question and receiving an answer, (ii) no

* Criminal Revision No. 898 against the order of J. A. Dawson, Additional Sessions Judge of Chittagong, dated July 15, 1911.